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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Mark Kelly,
Petitioner,

VS.

United States Department of Labor,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Mark Kelly, pro se Petitioner
10955 South Fork Road, Dillsboro, Indiana 47018
(812) 667-6546

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QUESTIONS PRESENTED

1) Does the Administrative Procedure's Act (APA), the standard of review applied by the Sixth Circuit to the United States Department of Labor's (DOL) Administrative Law Judge (ALJ) and Administrative Review Board (ARB) violate the Petitioner's Fifth Amendment Right to due process by making it impossible to remedy frauds upon the Courts and DOL administrative process? Or does the APA prevent a reviewing court from reversal or other actions to remedy frauds upon the Court and obvious misconduct of the parties during administrative hearings?

2) Do firing theats found to be illegal adverse actions against employees for protected activities "expire with time", when no significant changes in circumstances surrounding the protected activities have occurred? Is it reasonable that employees should "forget and ignore" those firing threats?

3) Do employers' demands that a professional technical employee sign and certify technical documents as accurate with no discussion and "with no changes permitted" degrade that employee's position when the employee knows that the documents are technically flawed and conceal those flaws from other technical professionals? Are such employer's demands adverse action in that they change the employee's status from that of a subcontracted technical scientist obligated to report objective technical findings to the status of an advocate (ie, a salesman), who is expected to conceal defects and errors to benefit employers?

PARTIES TO THE PROCEEDING

Parties to this appeal appear in the caption of the case on the cover page. Parties to the original Department of Labor Complaint and the ALJ Case were: Mark Kelly, Complainant, 10955 South Fork Road, Dillsboro, Indiana 47018. Lambda Research, Inc. Respondent. Fair Lane, Cincinnati, Ohio. Paul Prevey, Owner, represented by Robert A. Dimling, Frost, Brown, and Todd, LLC, Cincinnati, Ohio.

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CONSTITUTION OF THE UNITED STATES

U.S. Constitution Amendment V

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18 USC 1621

18 USC 1823

42 USC 5851

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Hindle, E. D. et. al. "Variation in the Strain Anisotropy of Zircaloy with Temperature and Strain", (ibid).

Knorr, D. B. et al. "Influence of Crystallographic Texture and Test Temperature on Initiation and Propogation of Iodine Stress-Corrosion Cracks in Zircaloy", (ibid).

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IAEA-TECDOC-1410 Delayed hydride cracking in zirconium alloys in pressure tube nuclear reactors. Final Report of a Coordinated Research Project, 1998-2002. October 2004. Edges and welds.

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Citations of Opinions and Orders

Opinion No. 04-3727 of the United States Court of Appeals for the Sixth Circuit dated Sept. 29, 2005. (A1). Administrative Review Board (ARB) Case 02-075 dated March 31, 2004 (A6). DOL Administrative Law Judge (ALJ) Case 2000-ERA-35 dated April 26, 2002 (A11). Department of Labor Investigation Re: Lambda Research/ Kelly/ 26708 Dated July 27, 2000 (A 69).

Jurisdiction

The Sixth Circuit Court's Decision No. 04-3727 was filed on September 29, 2005. This Court has jurisdiction to review the Judgment of the Sixth Circuit Court pursuant to Title 28 U.S.C. § 1257(1).

Statutes and Constitutional Provisions.

The basis for Petitioner's Federal action complaint of violations of the Energy Reorganization Act (ERA) 42 USC5851. The Federal Rules of Civil Procedure Rule 60 (b) and Fifth Amendment of the Constitution are the basis of this appeal.

STATEMENT OF THE CASE

The Sixth Circuit erred in upholding the DOL rulings, preventing remedies for obvious frauds upon the DOL. In effect, these frauds violated petitioner's Fifth Amendment rights to due process. The Sixth Circuit erred in deferring to ALJ discretion in ruling that illegal adverse actions such as firing threats

expire with time. The Sixth also erred in upholding the ALJ ruling that changing the character of technical professional's conditions of employment are not illegal adverse actions.

BACKGROUND

Lambda Texture Analysis Problems.

The case concerns discrimination against Petitioner for his attempts to report testing defects to General Electric Nuclear Systems (GEN). GEN subcontracted Respondent Lambda to test and generate texture data for zirconium materials used as cladding material in nuclear reactors fuel rods. This testing from 1996 to 2000.

In all audits of Lambda procedures used do this testing, in many purchase orders, and in other communications, GEN specifically cautioned Lambda that "10CFR21 applies to the procurement" and Lambda's services could "if defective or non-compliant, contribute to significant radiological safety hazards" and that, because many suppliers are "not aware of the end use of the various product and services", the supplier could not evaluate defects, and was to notify GEN. Many GEN communications to Lambda specifically cite the ERA, 10CR21, and 10CFR50 (A84, A85-A87, A75).

DOL Respondent Lambda hired Petitioner Mark Kelly, a Ph. D. chemist with extensive experience in materials analysis, in July of 1998. Lambda owner, Director of Research, and President Mr. Paul Prevey (who holds a BS but no

advanced degree) promoted Petitioner to lab manager in December of 1998.

Within months, Petitioner found defects in zirconium analysis methods. These test problems became clear after discussions with clients, review of the procedure, and discussions with co-workers (A78, A87, A88). These testing defects, began at least as early as 1997 (ie, prior to Petitioner's employment at Lambda) and continued until discovered when Petitioner became manager. Lambda's QA Manager Perry Mason made a "90 degree rotation error" rendering texture data "wrong" from 1997 until Petitioner found the problem in Feb. 1999 (A78). Of eight projects reviewed for this rotation error, Lambda records indicate two were "definitely wrong", four appeared "incorrect" and "skewed", and one was "OK" (A75, A76). GEN's records from an April 1999 audit showed no notification of this problem. Other problems with the procedure were found during an April 1999 Lambda review of the texture analysis procedure. Lambda tapes recorded that Prevey told Lambda manager Mike Glavicik that it was a "serious mistake" to instruct technicians to follow the written procedure rather than follow Mason's unwritten texture analysis instructions (A87). Procedure problems, Lambda QA problems, and failure of Lambda QA Manager Mason to maintain, follow, and require technicians to follow the written procedures audited by GEN (A84) were identified (A78, A86). The testing problems resulted in erroneous rotations of results and distorted data. Resulting errors appeared in some reports sent to clients (A75, A76).

After resolution of the rotation error, in June

of 1999, GEN questioned one set of distorted data included in May 1999 report written and signed by Glavicik and also signed by Lambda QA. At GEN's request, Petitioner analyzed the sample and found errors arising from procedure failures and failure of a technician to follow procedures. Petitioner summarized the problems in a Quality Assurance Report (QAR) (A72-A75). This QAR recommended review of past reports for the data distortion and notification to GEN so they could assess the problem, noting this was required per 10CFR21 (A75). Both technician Barger and Petitioner signed the QAR.

Prevey refused to sign the QAR. Prevey added handwritten edits and demanded that Petitioner alter the QAR to remove descriptions of written procedure problems as "already present". Prevey demanded that Petitioner include the edits that GEN had been "already notified" and "data were reviewed-see attached list" (A74-A75).

The "attached list" (A75-A76) was the April 19 email describing Glavicik's review for the rotation error, which was month before the erroneous June GEN report was written. While the email clearly indicates that data in several reports sent to client over the years were "definitely wrong, it clearly refers to the 90 degree error, not the newly found GEN defect. The fact that the author of the email later authored the defective GEN report is yet another instance of Lambda's problems with the procedures used in the GEN texture analysis. Prevey's inclusion of the email as evidence of "review" of errors (referring to an email written months before) was irrelevant to the GEN problem. Prevey's edits conceals lack of review for this newly

recognized problem and procedure problems.

Petitioner revised this QAR to include descriptions of pre-existing (but newly discovered) software problems that had contributed to the GEN data distortion and caused other errors. Petitioner did not include Prevey's edits, since, as detailed above, Prevey's edits falsely made it appear that the data "were reviewed" for new types of errors before they were made or understood (ie, Prevey's edits rendered the QAR inaccurate). In the 2001 ALJ hearing, Prevey testified that these edits to Petitioner's first QAR were "mistakes", validating Petitioner's refusal to include those edits in 1999. In September of 1999, Petitioner submitted a second version of QAR to Prevey for signature. After Prevey angrily rebuked Petitioner for failing to include these edits in this QAR, Petitioner explained to Prevey that his edits were in error. In response, Prevey forbade Petitioner from working on the GEN QAR or discussing the QAR with anyone, under threat of firing (A25).

Prevey's edits removed "notification" to GEN for past work required, "per 10CFR". The ALJ correctly found that Petitioner's concern with nuclear safety was over previous GEN work (A20). The ALJ also correctly noted that the "policy underlying the ERA" is to promote and encourage "the full and unfettered flow of safety-related information and safety concerns" (A46). Yet, the ALJ found no "nexus" between the firing threat, the QAR, and illegal adverse actions (A66, A67, A68).

The Sixth Circuit decision erred by qualifying the firing threats by adding "According to Kelly...", (A3). Prevey's firing threats were previously uncontested (by Lambda and the ALJ) firing threats into question with no apparent evidence.

Conflicting Descriptions of the QAR'S Purposes

At various points during the DOL investigation and hearing, Prevey gave contradictory descriptions of the nature and function of the QAR. Lambda records indicate that Prevey described the QAR to the DOL investigator Henry Yost in April of 2000 as follows: "The purpose is to document the error for the auditors as well as to inform all parties involved of the problem and it's solution, to fix it forever" (A89). In sworn deposition for the DOL hearing taken 2001 by Petitioner in presence of Lambda Council Robert Dimling, Prevey described the QAR as "something that we created as that response" to auditor's questions about problems and errors (A90). In a sworn affidavit to federal court (Case No. C-1-00-661) dated July 24, 2001 and witnessed by Lambda Council Dimling, Prevey stated "QAR's are not generated for anything other than for Lambda's own internal quality control purposes". (A90). In sworn testimony during the DOL hearing, Prevey testified about the QAR that "I think there's been a misrepresentation throughout these proceedings that this (QAR) is somehow the notification to the client. I mean, that is not true." (A93).

Did Mr. Dimling's suborn perjury in his elicitation of the ALJ testimony and preparation of the deposition?

Lambda records of GEN audits done speficially for zirconium testing compliance with 10CFR21 and 10CFR50b (A84-A85) show that

Lambda presented QARs to GEN auditors evidence that QA "conditions adverse to quality" were addressed and corrected (A84).

Prevey's Demands To Certify False QAR.

Between Sept., 1999 and Feb., 2000, Prevey held the QAR. During this period, Petitioner did work to correct the procedure problems that caused errors in the GEN analysis. Petitioner also contacted the NRC with his concerns about Prevey's demands that Petitioner falsify the QAR, concealing past defects. The NRC responded on Dec. 16, 1999 (A78-A84). The NRC "substantiated" that Lambda deficiencies distorted zirconium texture data. The NRC wrote "we are unsure how GE Nuclear or ... other clients use the texture analysis results. Since the NRC had no expertise in the use of zirconium texture analysis in the nuclear industry, two unidentified experts were consulted. One worked in industry. "...his company does not conduct texture analysis ... on a routine basis to evaluate characteristics..." of zirconium tubing. His company determined zirconium strength using other methods. The NRC concluded that it would not pursue Petitioner's safety concerns unless Petitioner re-contacted them. The NRC did not pursue an investigation of Prevey's retaliation against Petitioner at that time, stating that Petitioner's concerns for keeping his position.

No evidence shows that either GEN or Lambda were aware of the NRC letter to Petitioner. To the contrary, on January 10 of 2000, Global Nuclear Fuel-Americas (GNF: a joint venture of GE,

Hitatchi, and Toshiba) wrote Lambda a letter requiring information on Lambda's implementation of 10CFR 21: Reporting of Defects and Noncompliance in the GEN analysis by Jan. 28, 2000 (A85). The letter reiterated that 10CFR21 historically applied to GEN's POs with Lambda. Unlike the NRC communications, the GFA letter clearly stated safety concerns with Lambda's texture analysis. And, unlike the NRC, GEN knew the uses and informed Lambda that knowledge of the use of the data was required to evaluate safety concerns that might arise from defects in Lambda's work. (For an overview of potential safety concerns, see Ziconium in the Nuclear Industry Adamson, R. B (of GE), Franklin, D. G. eds. Zirconium in the Nuclear Industry. ASTM Special Publication 824 and following references in"Other Authorities", p vi) (Significantly, two of the joint venture companies are Japanese, some of whose activities may be beyond the purview of NRC regulation, since they are foreign. The ALJ specifically excluded Petitioner's attempts to introduce evidence of interests of foreign companies. Did the ALJ err in excluding consideration of evidence concerning foreign companies in joint venture with the American GEN, particularly in an increasingly globalized economy?) This Jan. 2000 GNS letter makes it clear that GNS, who knew the use of the data, and had safety concerns, had not been consulted by the NRC about Petitioner's concerns, and that GEN could assess impact of defects on safety because it knew the uses of the data, and no one else involved had any idea how this data was being used or would be used in the future. The technical authorities cited in the

introduction (p. vi) validate GEN's concerns.

Between Sept. '99's firing threats and Feb. 2000, Prevey took several adverse actions against Kelly. Relying heavily upon Prevey's testimony, the ALJ discounted reductions in evaluations (including demonstrably false attendance records (A32)), four negative memos hidden in Petitioner's personnel file (one describing the texture analysis as "routine"), and other hostility and angry outbursts (A25-A38).

In Feb. 2000, despite proper execution of the procedure, the Lambda GEN analysis procedure written by Mason in 1998 failed again. Petitioner recognized the error before Glavicik included any bad data in a GEN report. Petitioner then requested permission from Prevey to try to implement improvements on that procedure. On Feb. 17, 2000, Prevey responded to Petitioner with hostility and threatening outburst rather than answers and physically chased Petitioner around the lab. On February 18, 2000, Petitioner again wrote the NRC (and the DOL) requesting investigation of Prevey's and Lambda's work for GEN zirconium analysis and retaliation despite the fact that Petitioner knew his complaints would be disclosed to Lambda (A82-A83), but go no response until March, 2000.

On Feb. 25, 2000, Prevey demanded that Petitioner sign, and thereby certify as correct, a new version of the GEN QAR prepared by Prevey (A76), as the Sixth Decision put it, "with the understanding that no changes to the report would be permitted" (A3). Prevey's QAR did not include notification of GEN, review of the data, and some procedural problems Petitioner had found. Prevey demanded that Petitioner sign it without any discussion or

changes. Prevey initially instructed Petitioner to sign it immediately, then within 5 minutes, and then within an hour. After taking an hour to read the QAR, Petitioner asked Prevey if they could discuss the contents, giving Prevey two memos stating technical concerns. (As the Sixth Circuit Decision states: "Petitioner requested additional time to review the QAR, which Prevey granted with the understanding that no changes to the report would be permitted" (A3), clearly in violation of the ERA"s intent as interpreted by the ALJ (A46)). Prevey stated that there would be "no discussion". Rather than sign and certify the QAR as accurate "without discussion", Petitioner resigned giving 2 weeks notice, rather than be fired. Prevey requested Petitioner to complete some highly specialized work, which petitioner completed within an hour. Prevey then told Petitioner to leave by noon of that day.

Relying upon Prevey's testimony, the ALJ's analysis found that Prevey's Sept., 1999 illegal firing threats were "attenuated by the intervening five months" (A64) and separate from Prevey's Feb., 2000 demand to sign the QAR (A64-A66), resulting in the ALJ conclusion that there was no "nexus" between the Petitioner's protected activity regarding the QAR and constructive discharge (A66). Relying heavily upon Prevey's testimony, the ALJ excused well documented adverse actions taken by Prevey's directed at Petitioner from July, 99 to Feb. 25, 00.

Petitioner's DOL Action

Petitioner filed a complaint with the DOL, alleging discrimination prohibited by the ERA. DOL

investigator Henry Yost interviewed Prevey on April 27, 2000. Prevey described the QAR: "The purpose is to document the error for auditors as well as to inform all parties involved of the problem and its solution, to fix it forever" (A89). Significantly, Prevey also blamed the GEN error on Petitioner (MJK) (A89). Prevey also falsely stated that Petitioner delayed completing the QAR until Feb. (A90). This initial DOL investigation concluded that GEN was being properly notified of problems (A70).

Prevey's statement, placing the blame on Petitioner, contradicts the description of the source error in all Lambda records and testimony (eg A72-A78), including Prevey's QAR, which stated that the technician Barger made the error (A76-A77). Based upon Prevey's and other's ALJ testimony, the ALJ noted that in Spetember, "Prevey instructed Kelly not to waste any more time on the QAR..." and "...if his instructions were ignored he would be fired...". (A25) While Prevey correctly described the QAR to Yost, Prevey lied to the DOL to blame Petitioner for the problems. "A citizen may decline to answer a Government question, or answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood" (*Bryson v. United States*, 396 US 64, 72), (*Chance v. Erickson*, 96 SC 1395.) Prevey's lies to the DOL investigator significantly affected DOL decision (A70).

Petitioner filed an appeal with the DOL. An ALJ hearing (Case 200-ERA-35) was held Sept. 11-18, 2001. ALJ dismissed Petitioner's complaint (A11). The ALJ "specifically found Prevey to be credible", and based much of his decision on his testimony. (ALJ relied upon Kelly's testimony, but

questioned it based upon one instance of testimony (A3) where Kelly did not recall his answer to a **partially inaudible** 3-party telephone hearing over a year earlier regarding a compound question about the DOL and NRC (A93). ALJ also faulted Kelly for his use of reduction of "all" categories, when Prevey reduced 8 of 14 in his evaluation. This use of "all" appears colloquial or sloppy, given that the evaluation exhibit was right there being discussed: and the ALJ characterized it as exaggeration (A31). The ALJ and ARB ignored or excused all instances of inconsistencies of Prevey's ALJ testimony with Lambda records and other sworn testimony.)

After the ARB (ARB Case 02-075) refused Petitioner's motions for reversal or remand due to fraud and misconduct, Petitioner appealed to the Sixth Circuit, Case 04-3727. Petitioner detailed the factual inconsistencies with Lambda's testimony in briefs (unlike this writ, which is focused on three legal errors). The Sixth Circuit upheld the ALJ hearing (A1), leading to this petition.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Administrative Procedure's Act (APA), the standard of review, as applied by the Sixth Circuit to the review of the DOL and ALJ, violates Fifth Amendment Right to due process by making it impossible to remedy frauds upon the Courts and DOL administrative process. The Sixth Circuit's applied the APA standard for a review by applying "extreme deference to the hearing judge" in such a way as to allow frauds upon the DOL and so as to

place insurmountable barrier to assess and remedy misconduct. This violates Petitioner's Fifth Amendment right to due process.

Prevey's descriptions of the QAR are self-contradictory, impossible to reconcile, and self-exclusionary, and thus defrauded the process.

First, the Sixth Circuit's standard for review was that the ALJ findings of fact and decisions can be construed as reasonable and not self-exclusionary. However; comparison of Lambda owner Prevey's statements describing the QAR, to DOL investigators, sworn deposition statements, sworn ALJ testimony, a sworn deposition to Federal Court, and actual Lambda records of GEN audits show that Prevey's statements are "self-exclusionary". Prevey, with the apparent knowledge of Lambda council Dimling, defrauded the entire DOL process by changing his descriptions of the DOL in ways that are self exclusionary . To the DOL investigator, Prevey described the QAR's "purpose is to document the error for auditors as well as to inform all parties involved of the problem and its solution, to fix it forever" (A89). In sworn deposition taken for the ALJ hearing, Prevey described the QAR as something developed for auditors (A91). In sworn ALJ hearing testimony, Prevey testified that "there's been a misrepresentation throughout these proceedings that this is somehow the notification to the client. I mean, that is not true " (A93). Lambda records show that Lambda provided GEN auditors with QARs (A84). This, like Prevey's sworn affidavit, shows that Prevey did the "misrepresenting" to the

ALJ and to a federal court. Even the ALJ rejected Lambda's argument that the QARs were not protected activity (A17, A48). Yet, the ALJ ignored the self serving contradictions in Prevey's statements to the DOL, testimony, Lambda records, and affidavits. Prevey's frauds were allowed to stand.

The Sixth Circuit's application of the ABA review standard in such a way as to allow witnesses to change statements in self-contradictory but self-serving ways undermines the integrity of the entire judicial process. The evidence indicates Prevey committed perjury, prohibited by 18 USC 1621 and 18 USC 1823. "The right to testify does no include the right to commit perjury (*Nix v. Whiteside*, 475 US 157, 173). "A citizen may decline to answer a Government question, or answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood" (*Bryson v. United States*, 396 US 64, 72.)

Citing deference to the ALJ, The Sixth Circuit and the DOL decisions did not even mention Federal Rules of Civil Procedure Rule 60b, which Petitioner cited as an authority in appeals. Rule 60b allows reversal or other remedies in cases of fraud. Prevey's descriptions of the QAR are obviously irreconcilably different, and each self-serving under each circumstance.

The Sixth Circuit's decision statements that "Because the ALJ had the opportunity to observe the demeanor of the witnesses and was in the best position to assess their credibility, we will defer to the ALJ's credibility finding" (A5) allows the frauds to stand. The ALJ was not present at the DOL investigator's interview where Lambda records show

that Prevey described the QAR as "The purpose is to document the error for auditors as well as to inform all parties involved of the problem, to fix it forever (A89). The ALJ was not present during Prevey's sworn deposition when Prevey testified that auditors "asks for the response that we make in event that there's a problem observed. Now, we have this QA incident report as something that we created as that response" (A91). The ALJ was not present during GEN audits of Lambda (A84). The ALJ only observed Prevey's ALJ testimony that "I think there's been a misrepresentation throughout these proceedings that this (QAR) is somehow notification to the client. I mean, that is not true...Its for our own internal purposes" (A93). As such, upholding the ALJ's finding regarding Prevey's credibility was an abuse of judicial deference. The reviewing courts erred in not finding that the ALJ decision met the APA standard of reversal in that it was "capricious" and "arbitrary", especially in light of the evidence that Lambda presented GEN auditors QARs for review to meet a NIAC requirement (A84).

One disturbing aspect of this fraud is that Lambda attorney Dimling was present at the deposition, elicited the sworn ALJ testimony from Prevey that the QARs were internal, provided the petitioner with the Lambda record recording Prevey's statements to the DOL investigator at his firm's office. This evidence suggests that Mr. Dimling suborned perjury from Mr. Prevey in the ALJ by eliciting Prevey's ALJ testimony that QAR's were purely for internal purposes and witnessing Prevey's sworn affidavit submitted to Federal Court stating that the QAR was for internal purposes only.

Instead of addressing Petitioner's complaints of fraud under Rule 60b, the Sixth opinion misapplied the APA standard of review for credibility: that extreme (insurmountable?) deference is to be applied to the initial ALJ decision in determination of credibility.

Aside from the fraud, Prevey's irreconcilable statements concerning the QAR are extremely significant for two reasons. First, the QAR was a central issue in the ALJ (A11). Second, the false statements concerning the QARs indicate Prevey perjured himself in sworn testimony. The ALJ relied upon Prevey's testimony to excuse retaliation that Prevey took against Kelly, including physical intimidation . Third, the ALJ based key findings about the state of Lambda's procedures on Prevey's testimony that "round robin" studies had proven that previous Lambda data was OK (A24). No Lambda records supported this assertion. Prevey's assertions in testimony was the only evidence. (And considering the number of bad texture results released in 1997-99 (A72-A78), it's difficult to understand giving those Round Robin studies any credibility for work done during those years, assuming they were done.) The ALJ used findings based upon Prevey's testimony to underpin his decision (A68).

Rule 60b's intent is that injustice should not persist due to a mistaken final judgement. The rule allows remedy, including introduction of further evidence in cases of fraud. Petitioner requested that either the ALJ decision be overturned or remand of the decision.

The Fifth Amendment provides that "no

person shall...be deprived of life, liberty, or property, without due process of law". The Supreme Court upheld the Court of Appeals decision that employees have "a protected property interest in their employment" (89 F. 3d at 1581, *Chance v. Erickson* 96 US 1395, 1998). Therefore, the Sixth Circuit's application denies Petitioner his Fifth Amendment rights to due process.

Lambda Concealment of Evidence

Dimling's misconduct in the DOL ALJ judicial process was not limited to assisting in presenting Prevey's conflicting testimony. During discovery, Dimling responded to the petitioner's document requests for certain Lambda personnel files by refusing production, stating they had no relevant information. However, Dimling included items from these same personnel files in his pre-trial list of evidence. After the Petitioner objected to Dimling's response in a motion to the ALJ, the ALJ delayed the hearing and required Lambda to produce the files. A "Counseling Statement" written by Prevey was in one file. This documented that, in 1996, Prevey was aware that then Lambda QA manager Perry Mason had not updated written procedures used for the GEN zirconium texture analysis since 1994. In 1996, Prevey knew that Lambda's QA GEN procedures were defective years before he reprimanded Glavicik for requiring technicians to follow procedures because "That was a serious mistake" (A88) because "nobody followed the procedure to maintain the damn procedures" (A88).

Lambda Attorney Signaling Witness

During the ALJ hearing, the ALJ interrupted Petitioner's questioning of Lambda employee Barger in order to tell Lambda attorney Dimling that he, the ALJ, had observed Dimling signaling the witness. At the start of the next hearing, the ALJ hearing began with an apology by Mr. Dimling for appearing to signal or coach the witness (A91-A92). (At the time, the petitioner was proceeding pro se because on the first day of testimony, Petitioner's attorney, Mr. Schiller, had not adequately prepared for the hearing and was unfamiliar with some facts of the case, stating that his mother had been ill. For this and financial reasons, the Petitioner was proceeding alone and had difficulty observing Dimling and the witness). This disruption of the hearing process by Lambda was misconduct and interfered with the Petitioner's Fifth Amendment Rights to due process in the ALJ hearing.

Taken as a whole, Lambda's misconduct indicates the contempt with which Lambda held the DOL process, from initial investigation to hearing. Lambda's acts of misconduct amounted to frauds upon the Court, prohibited by the ALJ hearing rules, Rule 60(B), and proper application of the ABA.

As such, the Sixth Circuit decision upholding the ALJ and ARB rulings constitute violations of the Petition's Fifth Amendment rights, a "meaningful right to be heard" that was disrupted by Lambda's misconduct.

The Supreme Court found loss of an individual's employment amounted to loss of property, protected under due process per the Fifth

Amendment (*Chance v. Erickson*, 96 US1395).

Dimling's and Prevey's antics involving concealment of evidence, signaling witnesses, and introducing contradictory testimony and false affidavits demonstrate their contempt for the DOL and corrupted the judicial process, just as Lambda's bad QC corrupted Lambda reports sent to its clients (A75, A78). Writ of Certiori should be granted to maintain the integrity of the DOL and judicial process.

The Court should consider this petition for review because the Sixth Circuit's decisions uphold ALJ precedents concerning employment conditions that undermine the ERA prohibitions against retaliatory, adverse, and discriminatory actions against employees who are attempting to follow requirements of the ERA. This effectively repeals the ERA and defeats it purpose of allowing disclosure of defects without fear of retaliation (A46).

Firing Threats Don't Expire or Diminish in Five Months

The ALJ found that the firing threats made by Prevey in Sept 1999 were illegal adverse actions (A66). However, the ALJ dismissed Petitioner's complaint of discrimination over the QAR in Feb, 2000 because the threat of firing Kelly was"attenuated by the intervening five months to such a degree as to render the February confrontation a separate and distinct event" (A64) . The Sixth Circuit decision upheld that "Petitioner engaged in protected activity when he submitted the GEN QAR to Prevey in July 1999. Furthermore, Petitioner suffered an adverse employment action

when Prevey threatened to fire him if he spent any more time on the QAR or discussed it with other employees." (A4).

In the real world, firing threats made for specific actions as early as the first day are justification for firing years later. Firing threats do not "expire" without changes in circumstances. Prevey's demand that Petitioner not discuss or work on the QAR under threat of firing are very simple: such things are not casually forgotten. The DOL's finding that "firing threats expire" in five months without allowing any discussion was unreasonable and without basis in law. Despite the fact that the ALJ confirmed "Prevey's quick temper and abrasiveness" (A64) and acted before he had the facts (A58). This alone defeats the ERA's intent. But the record showed that Prevey fired about one out of twenty people per year, so such threats could not be taken lightly. The ALJ relied upon Prevey's assertion during the hearing that Prevey did not intend to fire Kelly on that day (A62). The Sixth erred in failing to reverse the ALJ finding that the firing threats directed at Petitioner specifically for discussing the QAR were "attenuated" and should have been disregarded by Kelly. To the contrary, the ALJ confirmed that Prevey demanded Kelly sign the QAR without changes (A3).

The firing threats undermine the very purpose of the ERA cited by the ALJ: "The policy underlying the ERA and the employee protections and are designed to promote the full, unfettered flow of safety-related information and safety concerns ..." (A46). Prevey's firing threats and refusal to allow discussion of the problems clearly undermine the

intent of the ERA. And in the light of the GNS/ GEN letter dated Jan. 10, 2000 stating that "historically 10CFR21 applied to GEN work" and the history of problems with the texture analysis used for GEN, documented in the QARs about the data distortion due to improper training (A72-A77), the "mechanical failure" of programs (A69, A77), the 90 degree rotation problem that occurred for years before Petitioner uncovered them upon starting his management of the lab (A75-A76), and Petitioner's predecessor Mason's failures to maintain procedures (A87-A88), Lambda zirconium analysis had a history of problems to match the history of 10CFR21 samples that concerned GEN/GNS (A84). (The Sixth Circuit finding that there "no problems with the testing" (A2) has no basis and conflicts with the ALJ note that "the procedure was changed to compensate for errors in the peak finding program" (A69) and Prevey's Feb. QAR statement that the current method did not produce flat specimens and that specimen flatness was not measured (A76-A78).

Demands on Petitioner to sign Prevey's QAR "without discussion" were discrimination in that they reduce technical experts to "Rubber Stamps"

The Sixth Circuit's confirmed that Prevey demanded that Petitioner sign the QAR "with the understanding that no changes to the report would be permitted" (A3). Prevey's demands drastically changed the conditions of the Petitioner's employment from that of a technical professional to that of a rubber stamp or an advocate participating

in frauds upon GEN, in violation of 10CFR21 requirements and the ERA. The employee compromises hard-earned professional knowledge to participate in potentially hazardous fraud to benefit the company.

The Sixth Circuit and ALJ decisions err because Prevey's demands that Petitioner sign Prevey's QAR without change or discussion are significant adverse employment actions. The Petitioner's employment is reduced from a technical scientist to an advocate (like a salesman or defense attorney), or even a rubber stamp (even salesmen and defense attorneys get to discuss issues). Petitioner was a Ph. D. chemist with extensive experience in materials science, and had much time and money invested in obtaining that degree and experience (A18). Petitioner has professional obligations to perform analysis, calculate, and objectively report results. Lambda's main product was reports, ie, information (A21). Prevey's demand that Petitioner sign a QAR that the Petitioner had not read, after Prevey had threatened to fire Petitioner if he "discussed it with other employees", required Petitioner to ignore professional and ethical standards to serve Lambda's purposes while creating "significant risk of radiological hazards", per GEN.

In the context of Prevey's "no changes" conditions, Petitioner continued employment reduced his status to that of a rubber stamp, applying his degree and credibility to benefit Lambda's bottom line, and ignoring his professional ethics, training, and experience. Petitioner's discovery of Lambda's analysis problems like the rotation error (A78, A75), which started years before Petitioner worked at

Lambda. Training and experience were necessary to generate accurate data. Any instrument will generate a number. Experience and knowledge are required to obtain and use data correctly.

The ALJ noted the importance of QA and correct procedures (A21) and also that the purpose of the ERA was to promote the free flow of information. How do demands that employees to sign reports without allowing employees to read and discuss them fit in the ERA?

The ALJ erred in not applying the provisions of the ERA prohibiting adverse job actions to Prevey's demands that Petitioner sign the QAR immediately without changes or discussion. In that Prevey's actions resulted in loss of Petitioner's job, the Sixth Circuit erred in not reversing the ALJ due to the violation of the Petitioner's Fifth Amendment rights to due process.

Dates indicate Lambda defrauded GEN during audit conducted per 10CFR21, 10CFR50b, and the ERA.

Public Policy Issues

Accurate data in materials analysis is essential, especially nuclear industry. As the Global/GEN letter of 2000 and other notification to Lambda explicitly warn, knowledge of the use of the zirconium data is required to assess the potential of radiological hazard produced by defects. This is particularly true in the United States and countries where, unlike some countries, nuclear plant designs are not standardized and procedures for the handling, transportation, and storage of spent fuel rods is still in development.

The fuel rod is one of the most safety critical reactor components. Fuel rod contains the radioactive fuel. Texture of the zirconium cladding influences the strength of the fuel rod and welded zirconium, hydride embrittlement, the stress corrosion crack resistance of the fuel rod, and the electrochemical activity of the fuel rod surface. Lambda witness Mike Glavicik (a hostile witness to Petitioner, the Lambda "expert" on texture analysis, and the author of one erroneous Lambda report) testified in the ALJ : you don't want to create another Three-Mile Island.

The effect of zirconium properties on the storage and handling of spent fuel rods is another critical area (See: Adamson, R. B (of GE), Franklin, D. G. eds. Zirconium in the Nuclear Industry. ASTM Special Publication 824. As this literature and both petitioner and Glavicik pointed out in testimony, understanding the stress corrosion cracking of zirconium cladding is a concern. Stress corrosion cracking can initiate zirconium failure and can cause failures in handling, usage, and particularly in long term storage of fuel rods. As IAEA-TECDOC-1410, "Delayed hydride cracking in zirconium alloys in pressure tube nuclear reactors. Final Report of a Coordinated Research Project", 1998-2002, and, "Edges and welds, and Science and Reactor Fundamentals -Materials", CNSC Technical Training Group (Especially Chap. 4.0 Pressure Tubes and Fuel Bundles. And 4.4 Hydrogen) show, texture is a crucial consideration when evaluating embrittlement. (These latter two references, written after the ALJ hearing, demonstrate that data takes lives of their own: future uses of old data can't be

anticipated. Therefore, the data quality and reliability must be honestly disclosed.)

Bad data concerning zirconium properties can lead to bad engineering decisions, which can cause disasters. In the ALJ, Prevey testified that he was ignorant of GEN's uses of zirconium texture data.

Complex systems whose defects can cause significant safety and economic damage, like nuclear reactors, rely upon chains of engineering safeguards for design and support. One link in GEN's engineering chain was Lambda. As the QARs and other evidence cited above shows, zirconium analysis involves specialized, complex procedure. Lambda's acts of repeatedly releasing flawed texture data in reports like those to US Steel, Westinghouse, Wright Patterson Air Force Base containing the 90 degree rotation error and the reports to GEN and Westinghouse containing the distortion errors demonstrate that recognition of texture analysis errors is not easy, even when scrutinized by "experts" like Lambda QA managers and owners: six of seven Lambda reports from 1997-99 reviewed were wrong (A74): a report to Westinghouse had both the rotation error and the later discovered GEN error.

The NRC report Dated December 15, 1999 (A78-A83) demonstrates the highly specialized nature of the work. The NRC itself had no one with the expertise to evaluate Lambda's texture analysis problems, so it consulted one unidentified industrial expert and one other expert. They confirmed that Lambda had problems with its texture analysis. The industrial expert noted that his company did not use texture analysis to determine strength of zirconium tubing, but the NRC letter very clearly stated that

the NRC did not know GEN's use of the Lambda texture data. The GEN/ Global Nuclear Fuels letter dated Jan. 10 2000 (notifying Lambda that GEN had changed its name to Global Nuclear Fuel) states that, one month after the NRC report, GEN still did require disclosure of texture data defects because knowledge of the use of the data was required to assess potential radiological hazard.

Because mistakes in this data can lead engineers to make catastrophic decisions, honest and frank disclosure of the errors is essential for safe use. Concealment and corruption of QA systems, like those that occurred at Lambda, are technically unacceptable for a safe nuclear industry. The need for disclosure of defects was clearly spelled out to Lambda Research in GEN audit records, POs, and other communications from GEN explicitly citing the ERA, 10CFR21, and/ or 10CFR50b.

Lambda's concealment of defects was a serious issue because Lambda's main product for GEN and other clients was information. As Nobel Prize economist George Akerloff explained in his noted paper "The Market For Lemons", corruption in industry tends to drive out the honest players. Perpetrators of fraud enjoy advantages, especially in a "regulated" market.

When promoting systems whose failures have safety and economic consequences (eg, nuclear power plants), engineers often cite "redundancy of safety systems" as a selling point. However, toleration of concealment of errors and corruption of QA run the risk of redundant failures due to "redundant frauds" perpetrated in design, operation, and QA of "redundant safety systems".

Mistakes occur, and assessments must be made as to whether these mistakes occur at an acceptable risk level for construction of nuclear power plants. However, concealment of errors and fraud, legally prohibited per ERA, 10CFR21, and 10CFR50b, are essential to for safe utilization of nuclear power. Some are in favor of safe nuclear power, and some are against nuclear power under any circumstances. **However, no one is in favor of unsafe nuclear power plants.** The uncontested necessity of the Price-Anderson Act, the ERA, and 10CFR21 arising therein demonstrate the need keep fraud out of engineering that can lead to an "extraordinary nuclear occurrence".

In this legislation, Congress has expressed the will of the people to keep nuclear power safe. However, the DOL and Judicial Branches must ensure these laws are upheld to reduce radiological hazards. Contractors and subcontractors of nuclear facilities should be held accountable for operations of their plants. It is virtually impossible to distinguish between levels of negligence in today's tort law: obvious fraud and misconduct should be seriously addressed by the courts.

The impact of nuclear accidents is clear from Vice President Cheney's statements that the Bush administration would seek renewed legislation exempting nuclear companies from unlimited liability for accidents as part of a plan to revive the nuclear industry. The Price-Anderson Act is a response to the huge economic consequences that can result from a nuclear accident. "Who pays how much" in a "worst case" accident is an important economic question whose actual answer is best

avoided by avoiding nuclear accidents. Although the Price-Anderson Act limits liability coverage for DOE facilities to about 10 billion dollars, it's believed that no utility would build a commercial nuclear reactor unless the utility's liabilities due to a nuclear accident were much greater.

Estimations of the extent of potential liabilities vary. The Calculation of Reactor Accident Consequences ("CRAC-II", which is still used today in parts of the world, performed by Sandia National Laboratories for the Nuclear Regulatory Commission) indicate damages could reach 300 billion dollars in property damage and thousands of deaths and illnesses. The NUREG-1150 estimates are based upon revised **measurements** and assumptions (eg, engineering data from accidents and **measurements of materials properties** like those determined for GEN by Lambda) of chemical forms and amounts of radiological releases.

Whichever study is used to assess possibility of nuclear disaster, the legacy of Chernobyl cannot be ignored. Parts of Chernobyl are uninhabitable for an indefinite period. Other data from an "extraordinary nuclear accident" is from Three Mile Island. What reliable information can be gleaned from the interpretation of these two data points and the few other serious accidents? The only obvious answer is "avoid the accidents, and avoid the consequences".

In event that an "extraordinary nuclear accident" in the US exceeded the limits established in the Price-Anderson Act, Congress could (and, morally, probably would be obligated to) take further actions, including the appropriation of more funds.

As the catastrophic consequences of failures of inadequate levies due to Hurricane Katrina and subsequent failures in New Orleans' civil protection efforts (ie, evacuation failure) so clearly demonstrate, an once of prevention is worth a pound (or tons) of cure, and Chernobyl shows that the best cure for an "extraordinary nuclear accident" might still leave parts of the US uninhabitable.

It must be emphasized that accurate, reliable, and uncorrupted MEASUREMENTS are the key to guiding engineering decisions in order to understand and minimize probability of failure, and to estimate the consequences of systems failure. Errors in measurements can have catastrophic consequences.

Those expert employees subcontracted to make those measurements must have the freedom to enables them to disclose errors that they find in those safety-critical measurements. As Three Mile Island and the less well known economic disasters preventing completion of nuclear power plants at Marble Hill, Indiana (due cheating on the concrete) and Moscow, Ohio (due to inferior welding), some are always ready to cut corners for profit. Subcontractors must be prevented from retaliating against expert technical employees for disclosing discovered defects, including defective data which could be used in design or setting operational parameters in event of malfunction. This Court must review this case in order to ensure that the ALJ and lower courts preserve these protections to expert technical employees, especially in today's "self regulating" industries.

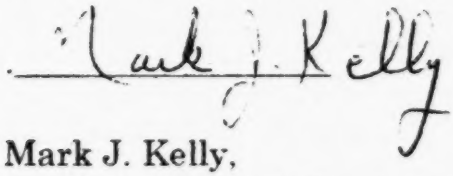
Prevey and other Lambda witnesses testified that they did not know how GEN used texture data.

The history of authoritarian control of science, resulting in people "just going along" with junk science, is long and ugly. Two notorious incidents shaped the 20 century. One was Hitler's "master race" rantings. Another, the "Lysenkoism" established as official science in the former Soviet Union, doomed the Soviets to backwardness in whole areas of biology. While encouraging behavior like Prevey's authoritarian demands that technical professionals certify erroneous results "without discussion or changes" when performing outsourced, subcontracted materials science analysis hopefully won't lead to such serious consequences, tolerance of corruption of data and redundant fraud in the design of "redundant safety systems for nuclear plants" could create hazards.

For these reasons, Petitioner respectfully requests this court to grant this Petition.

Dated: March 2, 2006

Respectfully submitted,



Mark J. Kelly,
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Dillsboro, IN 47018
Phone: (812) 667-6546

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Mark J. Kelly,
Petitioner

vs.

United States Department of Labor
Respondent

ORDER
Filed Sept. 29, 2005
Leonard Green, Clerk

Before: CLAY and GIBBONS, Circuit Judges; STEEH, District Judge*

Mark J. Kelly, proceeding pro se, petitions for review of a final decision and order of the Administrative Review Board (ARB) dismissing his complaint filed pursuant to the whistleblower provision of the Energy Reorganization Act (ERA), 42 USC 5851. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

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* The Honorable George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

Kelly's complaint centered around a Quality Assurance Report (QAR) that he prepared in 1999. On April 5, 2000, Kelly filed a complaint with the United States Department of Labor (DOL) against his former employer, Lambda Research Incorporated. The record indicates that in 1999, Kelly supervised the testing of zirconium tubes for General Electric Nuclear (GEN). A final report, which indicated a problem with the testing, was submitted to GEN. A second test was subsequently performed, which indicated that there were no problems with the testing. Therefore, a second report was submitted to GEN, which explained that an error had occurred with the first test.

On July 16, 1999, Kelly submitted a QAR with respect to the GEN zirconium tube testing to Paul Prevey, Lambda's president. In the QAR, Kelly recommended that GEN be notified of the problem that occurred with the zirconium tube testing, that GEN be informed that any past research and testing on zirconium tubes may not be reliable, and that some of Lambda's testing procedures be improved. Prevey reviewed Kelly's QAR and deleted Kelly's recommendations. Specifically, Prevey determined that it was not necessary to notify GEN of the problem because GEN had already been notified of the testing problem and why it had occurred, it was not necessary to review past zirconium tube research and testing provided to GEN because he believed that the error had not occurred in the past, and improvements to certain procedures followed by Lambda were not necessary because if the current procedures were followed correctly, quality was

assured. Kelly was directed to revise the QAR with Prevey's changes and return it to Prevey.

Kelly subsequently resubmitted the QAR to Prevey without the changes previously noted by Prevey. According to Kelly, Prevey became upset and instructed him not to expend any more time on the QAR or discuss this matter with other individuals in the laboratory or he would be fired. At a February 25, 2000, meeting, Prevey requested Kelly to sign the GEN QAR, as
time to review the QAR, which Prevey granted with the understanding that no changes would be permitted. Later that day, Kelly submitted his resignation letter to Prevey.

Thereafter, Kelly filed the instant complaint, alleging that his submission of the QAR and subsequent refusal to make the changes requested by Prevey caused him to suffer retaliation and ultimately constructive discharge. Following a hearing and briefing by the parties, an Administrative Law Judge (ALJ) filed a recommended decision and order, in which he recommended dismissing Kelly's complaint. Kelly filed a petition for review with the ARB. The ARB issued a final decision and order on March 31, 2004, in which it adopted and appended the ALJ's recommended decision and dismissed the case. Kelly's petition for reconsideration and motion to reverse was denied by the ARB on May 6, 2004. Kelly filed a petition for review of the ARB order.

We review a decision of the ARB in accordance with the provisions of the Administrative Procedure Act (APA), 5 USC 706. 42 USC 5851©(1); *Bartlick v. United States Dep't of Labor*, 73 F.3d 100, 102 (6th

Cir. 1966). Under the APA standard of review, we will not reverse the ARB's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence". 5 USC 706(2)(A), (E). This is a "highly deferential standard of review," and we "defer to the inferences that the [DOL] derives from the evidence." *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998) (quoting *Lockert v. United States Dep't of Labor* 876 F2d 513, 519n.2 (9th Cir. 1989).

To prevail in a retaliation claim under the ERA whistleblower provision, the complainant must demonstrate to the DOL that he engaged in protected activity, that he suffered an adverse employment action, and that the protected activity was a "contributing factor" in the adverse employment action. 42 USC 5851(b)(3)(C); *DeFord v. Sec'y Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

Upon review, we conclude that Kelly failed to establish that Lambda retaliated against him for raising safety concerns regarding the GEN zirconium tube testing. Kelly engaged in protected activity when he submitted the GEN QAR to Prevey in July 1999. Furthermore, Kelly suffered an adverse employment action when Prevey threatened to fire him if he spent any more time on the QAR or discussed it with other employees. However, Kelly failed to establish that his submission of the QAR contributed to the adverse action that he suffered. See 42 USC 5851(b)(3)(C); *DeFord*, 700 F.3d. at 286.

We further conclude that Kelly failed to present sufficient evidence of constructive discharge, as none of Kelly's allegations made the conditions of

his employment so intolerable that a reasonable person would be forced to resign. See *Smith v. Henderson*, 376 F.3d.529, 533-34 (6th Cir. 2004); *Policastro v. Northwest Airlines, Inc.*, 297 F.3.d 535, 539 (6th Cir. 2002).

Finally, Kelly takes issue with the ALJ's finding that Prevey was a credible witness. Because the ALJ had opportunity to observe the demeanor of the witnesses and was in the best position to assess their credibility, we will defer to the ALJ's credibility finding. *See Litton Microwave Cooking Prods. Div., Litton Sys. V. Nat'l Labor Relations Bd.* 868 F.2d 854 (6th Cir. 1989).

Accordingly, we deny the petition for review. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

Entered by Order of the Court

S/_____

Leonard Green, Clerk

US Department of Labor
Administrative Review Board
200 Constitution Ave., N. W.
Washington, DC 20210
ARB CASE NO. 02-075
ALJ CASE NO. 2000-ERA-35
DATE: March 31, 2004

In the Matter of:
MARK J. KELLY,
COMPLAINANT,
v.
LAMBDA RESEARCH, INC.,
RESPONDENT.
BEFORE: THE ADMINISTRATIVE REVIEW BOARD
Appearances:
***For the Complainant*:**
Mark J. Kelly, *pro se, Dillsboro, Indiana*

For the Respondent:
Robert A. Dimling, Esq., Mekesha H. Montgomery, Esq. *Frost Brown Todd, LLC, Cincinnati, Ohio*

FINAL DECISION AND ORDER

Mark J. Kelly filed a complaint against Lambda Research, Inc. (Lambda), under the employee protection provisions of the Energy Reorganization Act (ERA or Act), 42 U.S.C.A. § 5851 (West 1995)[1] alleging, inter alia, that Lambda constructively terminated his employment in retaliation for his having raised safety concerns. A Department of

Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) concluding that Kelly had failed to establish that Lambda retaliated against him, and Kelly appealed.

FACTS

Lambda employed Mark Kelly as a lab technician beginning in June 1998 and as a lab supervisor beginning in December 1998. At all relevant times, Lambda, a research laboratory specializing in x-ray diffraction, provided materials testing services to governmental and industrial clients. Paul Prevey founded Lambda in 1997 and was its Director of Research, President, and Chairman of the Board.

Whenever a problem occured with the testing of a client's materials, Lambda lab employees prepared a Quality Assurance Report (QAR), also referred to as a QA incident report. The QAR was an internal document kept permanently in Lambda's files, and while it was not presented to clients, outside parties could review it during any audit of the company's facilities. The QAR identified the nature and cause of the testing problem and contained a recommended solution.

On July 16, 1999, Kelly prepared a QAR addressing a problem with the testing of zirconium tubes for Lambda's client, GE Nuclear. GE Nuclear had already been informed of the testing problem and had been satisfied with Lambda's retesting of the materials. In the QAR, however, Kelly had recommended that GE Nuclear be further notified that past results from Lambda's tests may have been distorted, and that Lambda's procedures for handling these types of samples be modified. Kelly submitted the QAR to Paul Prevey for approval and signature.

Prevey returned this QAR to Kelly in August 1999. Prevey instructed Kelly to omit the noted recommendations because he did not want the procedures changed or the client further notified. Prevey pointed out to Kelly that the recommendation to change the procedure was not necessary because the testing error had occurred, not from an incorrect procedure, but because the procedure in the manual had not been followed. Prevey also told Kelly that the client needed no further notice regarding past test results because, had there been sample problems in the past, they would have been raised with the client at the time they happened. Thus, Prevey told Kelly to revise the QAR according to these instructions. But Kelly returned the draft QAR to Prevey in September 1999 without making the changes that Prevey had requested, that is, without removing the recommendations that Prevey had wanted omitted. After Kelly refused to make the changes to the QAR, Prevey reprimanded him, instructed him to stop wasting his time on the QAR, and told him not to speak to other lab personnel concerning it. Prevey also told Kelly that, if either of his instructions were ignored, he would be fired. Kelly resigned on February 25, 2000, later alleging that, because of this incident and other acts of discrimination, he had been constructively discharged.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has authority to review an ALJ's recommended decision in cases arising under the ERA. *See* 29 C.F.R. § 24.8 (2000). *See also* Secretary's Order No. 1-2002, 67

Fed. Reg. 64,272 (Oct. 17, 2002) (delegating the ARB authority to review cases arising under the environmental whistleblower statutes).

Under the Administrative Procedure Act, the ARB, as the designee of the Secretary, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996). The ARB engages in de novo review of the ALJ's recommended decision. *See Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 4 (ARB Sept. 30, 2003).

DISCUSSION

To succeed in an ERA case, the complainant must prove by a preponderance of evidence that he engaged in protected activity, that the employer knew about his activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. If the complainant succeeds in making this showing, the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *See Kester*, slip op. at 8.

The ALJ found that Kelly engaged in protected activity, known to Lambda, when he submitted the QAR in July 1999. R. D. & O. at 19-21. Furthermore, he found that Prevey's threat to fire Kelly was an adverse action. *Id.* at 30. Even so, the ALJ determined that Kelly did not demonstrate by a preponderance of evidence that submitting the QAR

contributed to his termination of employment from Lambda. R. D. & O. at 31.

We have carefully reviewed the record and the R. D. & O. The ALJ's recitation of the facts is accurate, thorough, and fair, and the record supports his findings of fact. Furthermore, the ALJ has applied appropriate law to these findings. Accordingly, we adopt and append the ALJ's recommended decision and **DISMISS** the case.

SO ORDERED.

S/_____

OLIVER M. TRANSUE
Administrative Appeals Judge

S/_____

WAYNE C. BEYER
Administrative Appeals Judge

[ENDNOTES]

[1] The statute provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]."

US Department of Labor,
Office of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio
(513) 684-3252

Issue date: 26Apr2002
Case No: 2000-ERA-0035

In the Matter of
MARK J. KELLY,
Complainant
v.
LAMBDA RESEARCH, INC.,
Respondent

APPEARANCES:
Mark Kelly
Pro se

Robert Dimling, Esquire
For the Respondent
BEFORE: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Section 5851, *et seq.*, hereinafter ERA. The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from

employment discrimination to employees in the nuclear industry who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq*. The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by the employer. To succeed, the complainant must demonstrate that his protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. 24.7(b).

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations. References to CX and RX refer to the exhibits of the complainant and respondent employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

I. PROCEDURAL HISTORY

Mark Kelly, Complainant, was employed by Lambda Research, Inc., Respondent, as a lab technician and, then, a lab supervisor until his resignation on

February 25, 2000. Mr. Kelly filed a complaint with the Department of Labor alleging numerous grounds of discrimination. His complaint was denied on July 27, 2000, and Mr. Kelly appealed for a formal hearing on August 1, 2000. The complainants allegation of discrimination under §211 of the Energy Reorganization Act was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held on the record from September 11, 2001, until September 18, 2001. Post-hearing briefs, with proposed findings of fact, and reply briefs were simultaneously submitted to the administrative law judge after the hearing.[1]

II. CREDIBILITY FINDINGS

I have thoughtfully considered and evaluated the rationality and internal consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence and have attempted to analyze and assess its cumulative impact on the record. *See Frady v. Tennessee Valley Auth.*, 92-ERA-19 at 4 (Secy Oct. 23, 1995)(citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Prod. v. Natl Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). Credibility is that quality in a witness which renders his evidence worthy of belief. *See Id.* For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of

> the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51. An administrative law judge is not bound

to believe or disbelieve the entirety of a witnesss testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Natl Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975)(citing *National Labor Relations Bd. v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds, 340 U.S. 474 (1951)).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from which impressions were garnered as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

The transcript of the hearing in this case is 957 pages in length, comprised of the testimony of six different witnesses. Although the record contains some inevitable inconsistencies in testimony, I find the separate testimony of all six witnesses to be credible.

Specifically addressing the testimony of Mark Kelly, I found his answers to be sincere, despite the difficulties of pro se testimony. It was apparent that Mr. Kelly believed the version of the facts as he was

relaying them. On specific incidents, however, Kellys testimony appears to be exaggerated, as no corroborating evidence supports his version of the facts and reason alone disagrees with Kelly. These few incidents will be noted in my analysis. Furthermore, Kellys honesty and trustworthiness were undercut upon cross-examination to some extent. The Respondents inquiry into previous statements made by Kelly under oath at an Unemployment Compensation hearing, demonstrated inconsistencies in his testimony, at a minimum. Alternatively, it demonstrated that Kelly allowed his answer to a question regarding the level of knowledge about his NRC technical investigation that he possessed at the time of his resignation to be interpreted in a misleading light. (Tr. 445-447). When questioned with the inconsistencies, Kellys explanation changed several times. (Tr. 445-48). I specifically find the testimony of Paul Prevey to be credible.

III. ISSUES

1. Whether Mark Kelly engaged in protected activity in his inclusion of various recommendations in the G.E. Nuclear Quality Assurance Incident Report and his subsequent refusal to sign a version of said report without such recommendations.

2. Whether Respondent discriminated against Mark Kelly by constructively discharging him through events from September 1999 to February 2000.

3. Whether Respondent discriminated against Mark Kelly by threatening to fire him for

"wasting time" after Mark Kelly ignored Paul Preveys editorial changes to the G.E. Nuclear Quality Assurance Incident Report.

IV. STATEMENT OF THE CASE

This issue in this case is whether Lambda Research, Inc. discriminated against Mark Kelly because of his engagement in protected activity.

Complainant contends that his recommendation of certain safety and procedural changes in a Quality Assurance Incident Report [QAR] and his concomitant refusal to sign a QAR with his recommendations omitted was a "protected activity" under the Energy Reorganization Act. Complainant alleges that the respondent discriminated against him and constructively discharged him because of his recommendations and refusal to acquiesce in an edited QAR by: 1) giving him a poor performance evaluation; 2) receiving a small bonus in Fall 1999; 3) changing company policies to only allow information to be provided to clients in final report form; 4) reducing his employment responsibilities; 5) placing negative evaluations in his personnel file without reviewing them with him 6) engaging in angry outbursts and tense confrontations with him; 7) shortening the delivery date on a laboratory project; 8) threatening to fire him for "wasting time" on the GEN QAR; and 9) reducing the staff in Lab II.

It is Lambda Researchs position that no protected activity took place, no retaliation occurred, and, furthermore, no nexus between the two can be demonstrated. Lambda provides explanations for each of the events that Kelly credits as discriminatory.

V. FINDINGS OF FACT

Lambda Research, Inc. is a research laboratory, providing research services such as Quantitative and Qualitative Phase Analysis, Residual Stress

Management, and Pole Figure Preparations to governmental, industrial, and educational clients. The laboratory specializes in X-ray diffraction. Lambda Research, Inc. is located in Fairfield, Ohio. Mark Kelly received a Ph. D. in analytical chemistry from the University of Cincinnati in 1988. In the summer of 1998, he was interviewed by Paul Prevey, the owner, director of research, and president of Lambda Research. Prevey hired Kelly to be a technician in "Lab II." In December 1998, he was promoted to a supervisor position in Lab II.

Kelly developed expertise in x-ray diffraction and texture analysis of materials as an employee at G.E. Aircraft Engines. (CX 22). After his employment at G.E. Aircraft Engines, Kelly worked as a senior analytical chemist for Shepherd Color for four and one-half years. After beginning his employment at Lambda Research, Kelly trained in Lambda procedures, including several x-ray diffraction methods and x-ray texture analysis methods performed for specific clients, such as General Electric Nuclear [GEN]. Kellys work as a technician was reviewed favorably. His immediate supervisor, Perry Mason, testified that Kelly was good following quality assurance procedures and understood x-ray diffraction. (CX 17, 63).

During the time of Kellys employment with Respondent, Lambda Research performed x-ray diffraction texture analysis of zirconium [Zr.] alloy materials for GEN. (CX 3-5, 30, 36). In order for Lambda to qualify to perform such work, Lambda and its quality systems were audited by GEN. In addition, Lambda participated in a round-robin

exchange of research data with GEN to demonstrate their capability to perform accurately the necessary work for GEN.

In January 1999, Mr. Richard Calcaterra of GEN contacted Kelly concerning an upcoming audit of Lambda Research. (Tr. 51). The purpose of the audit was to determine if Lambda was proficient enough to perform research services for GEN. One goal of the audit was to determine if Lambdas procedures complied with various nuclear safety regulations, specifically 10 C.F.R. § 21 and 10 C.F.R. § 50(b). Mr. Calcaterra relayed these regulations to Kelly and their importance in ensuring nuclear safety. (Tr. 53, 55). Calcaterra, however, did not tell Kelly that the regulations would apply to any specific work to be sent to Lambda. (Tr. 54-55). Calcaterra asked Kelly to arrange for x-ray diffraction texture analysis on zirconium specimens. (CX 46, 5). The purchase order for the first type of work that Calcaterra had described to Kelly did include the 10 C.F.R. § 21 notification requirement. (Tr. 56-57; CX 5, p. 3). Kelly testified that his understanding of 10 C.F.R. § 21 required him to contact GEN when problems with the requested research occurred. (Tr. 58). Kelly also asserted that this responsibility to notify clients of problems stemmed from Lambdas corrective action procedure in its quality system. (*Id.*).

In June 1999, Kellys Lab II performed further texture analysis on the zirconium tubes. This work was performed after a purchase order generated on May 12, 1999, was received. (Tr. 927, RX 1, p. 3). This purchase order did not contain the 10 C.F.R. § 21 notification requirement. (RX 1). After the testing was completed, Michael Glavicic, a senior research

assistant at Lambda, analyzed the collected data. In his report, Glavicic noted some irregularities. Specifically, some of the data appeared "atypical," and Glavicic included a notification that alerted GEN to this fact in his report. The final report sent to GEN stated that some of the data was "not typical." (CX 2; Tr. 120). Because of the unusual results and a request by Chuck McKinney of GEN, further testing was performed on another sample - this time with no unusual results. (Tr. 121-22). The report submitted to GEN regarding the re-test concluded that "sample mounting error" had produced the unexpected results, not an atypical sample. (CX 2).

After the problems with the GEN project were identified, Kelly wrote Prevey a memorandum suggesting several changes in the laboratorys procedures on July 2, 1999. (Tr. 225; CX 19, p. 15). Kelly asserted that Prevey often reacted to problems brought by staff by insulting them, accusing them of being the problem instead of the procedures. (Tr. 225). Because Kelly perceived a communication problem with Prevey, he wrote the memorandum addressing the problems he identified in the lab. (Tr. 226). In addition to changing some procedures and ensuring correct personnel training, Kellys memorandum suggested contacting GEN about the problem of sample flatness and its effect on past work performed by Lambda. (CX 19, p. 15). Kellys memorandum clearly indicates that Kellys concern with nuclear safety is not a byproduct of that specific project, but rather previous work that GEN has sent to Lambda which was subject to the same inadequate procedures. (*Id.*).

Kelly and Prevey discussed his memorandum, and Prevey ended the discussion by throwing the document in the trash can. (Tr. 227). This period of time was a tense time in the lab, according to Kelly. He worried about Prevey coming into the lab "launch[ing] into a tirade." (Tr. 244). For example, during a review of standards in the lab, Kelly alleges that his job was threatened because he was "stealing time" from Prevey by reviewing procedures. (Tr. 244-45). The atmosphere was so tense that Kelly immediately called the Nuclear Regulatory Commission [NRC] after his job was threatened. (Tr. 245-46). He did not identify himself to the NRC, however. (Tr. 246).

Whenever a problem occurs with testing at Lambda, a Quality Assurance Incident Report [QAR] is required to be prepared. (Tr. 520, 860). The QAR is an internal document, and is not sent to external clients. The document, however, is available for review, if requested by external parties, during system audits of the facilities. As mentioned above, GEN performed such an audit before it authorized Lambda to perform research for GEN. (CX 46, Tr. 856). The maintenance of a high quality QAR system is integral to the successful operation of such a research facility. (Tr. 696-697). As with other laboratories, Lambdas product is information. To move that product, Lambda must convince clients that its information, and the systems used to procure it, are maintained at the highest level and followed zealously. (Tr. 697). The QAR promotes consistent, effective information-gathering procedures by ensuring proper procedures are consistently enforced. (Tr. 860). When a problem arises with the

procedure or the results obtained from the procedure, quality assurance incident reports leave "bread-crumb" trails throughout the procedure, enabling Lambda and, if necessary, external clients to retrace the steps of the research to determine where and when mistakes occurred. (*Id.*). As Lambda frequently worked with materials for the nuclear industry, the QAR system also served to ensure clients that defects in data could be contained and minimized, thus minimizing the possibility of a catastrophic mistake. (Tr. 59). When working with hazardous materials, this guarantee is obviously important to the clients. (Tr. 861-62).

On July 16, 1999, Kelly, along with lab technician Chris Barger, prepared a QAR addressing the problems with the testing of the GEN zirconium tubes identified by Glavicic and the final report to GEN. (CX 1; Tr. 247). As standard procedure dictated, Kelly forwarded the completed QAR to Paul Prevey, president of Lambda Research and Kellys supervisor, for approval. (Tr. 249). The QAR included the following recommendations: 1) previous zirconium texture analysis results should be reviewed to determine if significant distortion of texture analysis occurred [because of the sample mounting error]; 2) the client should be notified that other data may have been distorted so that they could assess the significance of the problem; and 3) the pole figure procedure and sample preparation procedure should be revised to prevent reoccurrence of the sample preparation problem and failure of the peak program. (CX 1, p. 2). Kelly attributed most of the problem to technician error, stating, "Most of the flatness problem occurred because the technician did

not follow the directions for use of the contact cement required by [the sample mounting procedure]." The QAR submitted by Kelly did not mention or implicate nuclear safety; however, the memorandum written to Prevey by Kelly on July 2, 1999, addressing the exact same problem, clearly identified that the presence of the 10 C.F.R. 21 requirement in previous purchase orders from GEN was a driving force in Kellys concern and recommendations. (CX 19, p. 5).

On August 16, 1999, Perry Mason returned the QAR to Kelly. (Tr. 249). Prevey had not signed the QAR, but he had removed the recommendations to revise the sample mounting and pole figure procedures and notify GEN of the problems. (CX 1; Tr. 250-51). Prevey decided that the current procedures, if followed correctly, already insured sample flatness. (Tr. 663-67). Prevey maintained that no further notification was necessary because GEN had already been notified in the second report that a "sample mounting error" had occurred and because all data had been previously checked against archival data. (Tr. 685). Prevey believed that Kellys QAR recommendation to notify GEN of the sample mounting error was actually referring to the 90 degree rotation problem the lab had experienced months earlier. (Tr. 653). Accordingly, Prevey noted on the QAR that the client had already been notified. (Tr. 654). Prevey also dismissed Kellys recommendation to re-check former projects for GEN because he believed that this was the first time that data produced for GEN had not matched the archival data or the data set received from the round-robin Lambda had participated in with GEN. (Tr. 659-60, 686).

Kelly disagreed with Preveys changes, labeling them "inappropriate." (Tr. 250). Kelly asserts that "Preveys directions to have the recommendations to correct the procedure removed from the QAR are evidence that his intent was to avoid admitting and documenting the problems with...procedures used to obtain texture results for GEN up to that point and...during audits of Lambda Research." (Complainants Post-Hearing Brief, p. 26).

After the original draft of the QAR, Lab II identified a random mechanical problem that may have influenced the results sent to GEN involving the "peak finding program." (Tr. 254-57). Kelly informed Prevey of the problem, but Prevey rejected a change in procedure, stating that procedures were not changed to fix mechanical problems. (Tr. 259).

After the first submission of the QAR, Kelly and Prevey discussed the proposed changes. (Tr. 659). Prevey maintained that the procedures were sound, the problems existed in execution, and that it was pure speculation on Kellys behalf that problems had occurred in the past redounding from sample flatness errors. (*Id.*). Prevey based his conclusion that there were no problems with the procedures as they stood based on the hundreds of previous samples examined by Lambda and, more importantly, the consistent accuracy of Lambdas work compared to the round-robin exchange of data it had participated in with GEN. (Tr. 660).

Kelly returned the draft QAR to Prevey in September 1999 without making the changes that Prevey had requested. (Tr. 269). When Kelly returned the second draft to Prevey in September, he also included recommendations to fix the peak

finding program and procedure and check older work for this specific problem to avoid future errors. (CX 1; Tr. 268).[2]

After Kellys second submission of the QAR, Prevey and Kelly confronted one another over the draft of the document. (Tr. 269). Prevey reprimanded Kelly for failing to make the suggested changes he had given Kelly in August. (Tr. 269, 679). At that time, Prevey instructed Kelly not to waste any more time on the QAR. (Tr. 270, 679). Kelly was also told not to speak to Michael Glavicic or others in the laboratory concerning the QAR. (Tr. 271, 679). Prevey told Kelly that if either of his instructions were ignored, he would be fired. (Tr. 270-71, 679-80). Prevey wanted to put an end to the "haranguing" over the QAR. (Tr. 680). After reprimanding Kelly, Prevey took the QAR from Kelly to draft himself. (*Id.*). After Prevey took the QAR from Kelly, it would be February before the two men discussed the QAR again. (Tr. 416).

In between the September confrontation between Prevey and Kelly and the February meeting where Kelly and Barger were asked to sign the QAR regarding the GEN project, events occurred in the laboratory that Kelly alleges are discriminatory and constructively discharged him. Each will be discussed individually.

Western Zirconium Incident

In September 1999, Western Zirconium requested that Lambda perform x-ray diffraction texture analysis on some samples. (Tr. 272). Kelly quoted the client a turn-around time of three weeks, but, upon the clients request, Prevey, unbeknownst to Kelly who was out of the lab at that time, shortened the delivery time in half to approximately a week and a

half. (Tr. 868, 274). When Kelly returned, Prevey confronted Kelly about quoting three weeks for the turn around time and instructed that turn around times should be shorter. (CX 25, p. 18). The project was not completed in time. Kelly had not performed the analysis because he believed that he was not certified to do so and to have performed the work uncertified would have been a QA violation. (Tr. 287). When the only employee certified to perform that specific type of analysis Mike Glavicic returned from a funeral the day after the deadline Prevey quoted, Kelly attempted to ask Glavicic to quickly perform the analysis. (Tr. 288).

Prevey overheard the request and confronted Kelly regarding why the project had not been completed. (Tr. 289). Prevey and Kelly disagreed as to whether it was appropriate for Kelly to have performed the analysis. (Tr. 288, 700). Kelly was aware of a new procedure being implemented by Glavicic, and he had seen a demonstration of the procedure. (Tr. 287-88). Kelly, however, had not seen the final procedure. (Tr. 288). Prevey reprimanded Kelly because Kelly could have performed the work under the existing procedure, but chose not to. (Tr. 700-01). Kelly alleges that the reprimand was laced with cursing, and that he was later told that he was "stupid" and "incompetent" and using the quality system to hold up work (Tr. 289-90, 294). Kelly admits that Prevey said "that we were all stupid and incompetent." (Tr. 290).

Prevey subsequently noted Kellys failure to complete the project in Kellys personnel file. (Tr. 290, 700). Prevey also noted that work on the project not related to the new procedure had not been

completed. (Tr. 701-02). Regardless of any perception on Kellys part of an inability to perform the procedure, he could have completed the QA checks unrelated to Glavicics new procedure. (Tr. 701). Kelly did not see or know of the memorandum placed in his personnel file until the discovery phase of the instant case. (Tr. 271).

Specs Milling Machine Maintenance Incident

On September 14, 1999, Kelly noticed some oil on the milling machine and began to wipe it off. (Tr. 299). At that time, Prevey walked through the laboratory and inquired about what Kelly was doing. (Tr. 298). Prevey stopped because the milling machine was making a loud noise. (Tr. 708). When Kelly attempted to explain that he was attempting to locate the source of the oil, he was accused of dropping maintenance assignments. (*Id.*). Kelly admitted that it was his responsibility to have seen to the machines maintenance. (Tr. 300). Kellys mistake was caused by a misunderstanding in the allocation of responsibilities after a co-worker transferred into the laboratory. (Tr. 299-300). Kelly maintains that Prevey began yelling and cursing at him, but no other testimony supports this claim. (Tr. 300). Chris Barger was there at the incident, (Tr. 298, 708; CX 17, p. 31), but he offered no testimony on any cursing or yelling by Prevey. (Tr. 913). Indeed, Barger testified that he never heard Prevey swear at Kelly. (*Id.*).

Prevey indicated that his reaction was not caused by the lack of maintenance on the machine, but by Kellys reaction to Preveys inquiry. Prevey recorded in a memorandum to Kellys personnel file that Kelly expressed the belief that Lambdas policy was for

employees to wait for failure of the apparatus before interceding with maintenance. (Tr. 708-09; CX 17, p. 31). Prevey was "aghast" at Kellys response, especially since the remark was made in front of two employees that Kelly supervised, Beth Schumaker and Chris Barger. (Tr. 709). Kelly advances that Preveys reaction was not called for because all of his former personnel reviews demonstrate responsibility with company property and Prevey reacted much less harshly to dropped assignments by other employees. (Tr. 300-06). Kelly, however, later admitted that he "was aware of other situations at Lambda Research where people had done similar things and he [Prevey] may have lost his temper." (Tr. 312). Kelly did not see the memorandum Prevey authored until he initiated the instant case and received it in discovery. (Tr. 307, 309).

Developer Solution Incident

Kelly and Prevey again confronted each other when a developer solution ran out at the laboratory. (Tr. 314). Kelly was responsible for the inventory, and, between inventories, someone in the lab had used an unusual amount of developer, causing the solution to run out. (Tr. 315). When Prevey was made aware of the situation, he called Kelly to his office and held him responsible for the upheld project. (Tr. 316). Kelly alleges that Prevey told him that he should be held responsible for delaying a space shuttle flight. (*Id.*). Kelly took this as a sarcastic remark, but he knew that Prevey was angry. (*Id.*).

Word Processing Template Incident

Prevey called Kelly into his office and informed him that he was somehow "screwing up" a report generated through the offices word processing

system. (Tr. 317). Prevey said that Kellys corrections on his computer to word processing templates was causing the front office an undue amount of work. Kelly alleges that Prevey accused him of stealing from him and wasting untold amounts of time in senseless work. (*Id.*). Kelly later discovered that he was not the individual causing the error in the reports, and informed Prevey. (Tr. 318). When told, Prevey simply walked away. (*Id.*).

Kelly Accused of Mismanagement

In early September 1999, Kelly took a vacation day. When he was gone, Prevey checked on the laboratory and discovered two technicians sitting at their desk with their diffractometers empty. (Tr. 319, 338). When Kelly returned, he was called into Preveys office where Prevey proceeded to inform him of the inactivity in the lab, that the inactivity affected the bottom line profitability of the laboratory, and that he should be fired for that. (Tr. 319). Kelly agreed that profitability was very important, but he did not agree with the hostile tone with which Prevey spoke or Preveys assumption that the workers were unproductive intentionally. (Tr. 339). Kelly claimed that Prevey cursed at him and engaged in what he termed "verbal abuse." (*Id.*). After Kelly investigated what the technicians were working on during the day of his absence, he went back to talk again to Prevey. (*Id.*). Prevey accused the technicians of "playing games" with Kelly, and that he was not properly managing his employees. (Tr. 340). To verify the technicians stories, Kelly compared their time cards against past time cards, concluding that nothing was irregular. (*Id.*). Prevey asserted that the time cards were being filled out incorrectly, money was flying

out the window, and Kelly was mismanaging the lab. (*Id.*). In a later QA management meeting, it was discovered that the technicians were not incorrectly filling out the time cards. (Tr. 340-41). Kelly felt that nothing came of the time card issue, but "the verbal reprimands and accusations were extremely stressful and very difficult." (Tr. 341). Kelly attributed the treatment to his handling of the GEN incident. (*Id.*). Kelly stated that Preveys behavior would get better, then worse. (*Id.*).

Kelly Threatened Over Procedural Issues

On several occasions, Prevey stated that Kelly should be shot for raising the procedural issues and holding up work to address QA issues. (Tr. 337). Kelly took the statements as only expressions and did not take them as physical threats, but rather took them as indication of the anger and hostility with which Prevey would approach problems. (*Id.*). No other witness at the hearing testified to hearing Prevey ever physically threaten Kelly. Furthermore, no witness testified to ever being physically threatened by Prevey.

Kelly Receives Lower Performance Evaluation

Kelly alleges that his personnel reviews were ranked lower in retaliation for his refusal to sign the GEN QAR. (Tr. 345) The record contains four personnel reviews for Kelly. (CX 17, p. 9-26). The first two reviews were completed by Kellys supervisor before Prevey, Perry Mason. Those reviews occurred in September and November 1998. (CX 17, p. 9-14). Kellys final two reviews were completed by Prevey. (CX 17, p. 15-26). Those reviews occurred in June and September 1999. (*Id.*). In between the latter two reviews, the GEN QAR issue arose, and Kelly refused to sign the edited version. (Tr. 358). In September 1999, Kelly received a performance appraisal. (Tr. 345; CX 17, p. 22-24). Kellys rankings were lower in almost every area compared to his previous performance appraisal by Paul Prevey. The evaluation is separated into two categories: general work characteristics and attitude and behavior characteristics. In the general work characteristics section, Kellys second evaluation from Prevey is lower in five of the seven categories, with the biggest

drop in "Supports and complies with QA policies and procedures." (CX 17, p. 15, 22). In the attitude and behavior characteristics category, Kellys evaluation dropped in three of the seven categories. (CX 17, p. 16, 23). Kelly exaggerates when he claims that all of his scores, except one, were lower in September than June. (Tr. 347). Of the fourteen rated categories, only eight were ranked lower, not thirteen as Kelly intimates.

Prevey attributes the lower rankings to several factors. First, Prevey stated that he tends to give higher grades the first time he reviews an employee as an incentive tool. (Tr. 769). While this factor seems questionable, his remaining reasons are convincing. Secondly, Prevey claims that some of Kellys performance did not match the level of competence he assumed Kelly possessed. (Tr. 768). The second evaluation, unlike the first evaluation, reflected the fact that Prevey had an opportunity to observe Kellys work for a substantial period of time. (*Id.*). In addition, Prevey attributed Kellys higher marks on the June evaluation due to Kellys expressed interest at that time of "ferret[ing] out any loose ends in the QA system." (Tr. 770). Kellys enthusiasm for the task earned him higher marks. (*Id.*). When the second review came around, the promise of Kellys performance, according to Prevey, had not fulfilled itself. (Tr. 770-71). Finally, Prevey admitted that Kellys personnel reviews, like all such reviews, are subjective. (Tr. 769, 772).

Kelly specifically points to one particular evaluation mark. During the period encompassed by the June evaluation, Kelly missed three days of work for sick time. His attendance record was judged

"outstanding" by Prevey. (Tr. 772-74). During the period of time encompassed by the September review, Kellys attendance improved, using only one day of sick leave. (Tr. 774). Yet, in the September review conducted by Prevey, Kellys better attendance was actually judged worse, receiving a "very good" instead of the "outstanding" rating he received when he missed three days worth of work due to illness. (Tr. 772-73). When presented with the seeming inequity, Prevey responded, "I dont review these [attendance record sheets], really, when I look at that. I mean, thats not really a quantifying, I mean, Im not trying to quantify this that way." (Tr. 774).

Kelly Receives Smallest Third-Quarter Bonus in Lab II

Kelly alleges that his receipt of the smallest third-quarter bonus in Lab II evinces retalia-tory discrimination. (Complainants Post-Hearing Brief, p. 49). The record does not support this allegation.

In his testimony, Prevey described the two separate bonus programs implemented at Lambda. (Tr. 874). Managers at Lambda, including Kelly, participate in both programs, and all other employees participate in only one bonus program. (*Id.*). Prevey participates in neither program. (*Id.*). In the bonus program participated in by all employees, ten percent of a quarters profits are divided up based upon the following criteria: one-third based on years of service and two-thirds based on salary. (*Id.*). After the application of a formula, the money is divided up. The first half is a mandatory bonus, and the second half is a discretionary amount that the supervisor may award. The second bonus program, participated

in by only managers, is more arbitrary and awarded on an annual basis. Prevey will take around 10% of the profits and divide it on a discretionary basis between the managers. (Tr. 874-75).

In the first and third quarters of 1999, the company lost money. (Tr. 877). No bonuses were given in the first quarter, except for one to Chris Barger out of a back-up pool of money. In the third quarter, Kelly did receive the smallest bonus in Lab II, but only because he dispensed money to the employees he supervised under the discretionary bonus fund. Before Kelly himself dispensed funds, he actually received the largest bonus in Lab II. In December, Kelly received a bonus of ,599.89 from the bonus program all employees participated in. (RX 31, p.5). In addition, Kelly received an annual bonus given only to managers totaling $2,000. (RX 31, p.3). The record reflects that Prevey actually gave all managers bonuses larger than the bonus program normally produced in the fourth quarter of 1999. (*Id.*; Tr. 878-79). Kelly admits that he received a "good" bonus in December. (CX 25, p.22).

Kellys pay was never decreased at any time during his employment at Lambda. (Tr. 872).

Kellys Responsibilities Were Decreased

In late January and early February 2000, Kelly alleges that events took place indicating that Kellys responsibilities and authority were being removed from him. Prevey announced that Glavicic would begin attending weekly Lab II meetings. Also, Glavicic began working on Lab II analysis, and, to come up to speed, began reviewing all of the Lab II work. (Tr. 403). Kelly viewed Glavicics entrance into the laboratory as a precursor to Glavicic taking over

Kellys job. (Tr. 404). Kelly believed he was training his eventual replacement based upon a similar situation he had previously witnessed at Lambda involving two other employees. (Tr. 406-07). Glavicic testified that Prevey never informed him about any plan for him to take over Kellys job. (Tr. 124). Glavicic was told that he was helping out in Lab II to expedite the processing of late lab reports. (*Id.*). Bargers testimony supports this proposition, as he testified to increased production and timeliness when Kelly resigned. (Tr. 912-13). Glavicic did manage Lab II after Kelly left. (Tr. 124).

Shift in Lambda Policy to Provide Clients Reports in Final Form Only

Another change made on February 24, 2000 the day before Kelly resigned was that Prevey announced that partial results would no longer be issued to clients. (Tr. 414). Clients would only receive the final report. This rule was not aimed at Kelly, but was implemented lab-wide.

Lab II Staff was Decreased

Producing work became increasingly difficult, Kelly alleges, as the number of staff in Lab II fluctuated and, over time, decreased until only Kelly and Barger were working in the lab. When Kelly began work at Lambda, he made the fourth employee in the lab. (Tr. 321). The lab was staffed with employees until approximately December 1998, until John Haas was hired. Haas became the fifth employee in the lab. (Tr. 323). Shortly thereafter, Perry Mason was assigned to a different project. (*Id.*). In May 1999, Haas was transferred to another lab, leaving only three staff in the lab. (Tr. 325). Lab IIs staff was further undercut when Beth Schumaker, research

engineer, became physically unable to perform some of the necessary work. (*Id.*). All of these events took place before the disputed GEN QAR.

In November 1999, Schumaker left Lambda to follow her husband to another job in Indiana. (Tr. 328). From November 1999 until Kelly left the lab, only he and Barger worked in Lab II on a permanent basis. With only two staff, completing work became very difficult, according to Kelly, as QA checks became impossible to complete when one or the other was not working. (*Id.*). During that time, potential staff was interviewed, but none were hired. Prevey rejected the one applicant Kelly recommended. (*Id.*). The workload had not changed from the time Kelly started at Lambda, but the staff had fallen from four to two. (Tr. 329). The staffing situation created a lot of tension and overwork, according to Kelly. (Tr. 330).

Mounting Procedure Incident

On February 18, 2000, Kelly arrived at work to see Prevey and Glavicic working in Lab II. They were changing the pole figure procedure, as Kelly had requested. (Tr. 398). Then, Prevey confronted Kelly about not changing the procedure as he had been instructed to in the previous week. (Tr. 736-37). Kelly responded that his actions were directed by the QA system and, furthermore, disputed that he received any clear directive to change the procedure. (*Id.*, Tr. 399-400). Prevey states that Kelly was irrationally maintaining that GE had to be contacted before any procedure could be changed. (Tr. 738). Kelly maintains that he simply wanted to provide a

copy of the procedure to GE, not request their approval. (Tr. 399-400).

Without Kellys knowledge, this disagreement was documented in his personnel file by a memorandum written by Prevey. (*Id.*; CX 17, p. 36). Kelly disputes the content of the memorandum, claiming that, if he had acted as Prevey claimed, he would have violated the QA system. (Tr. 399). Kelly interprets this as evidence of Preveys continuing irrational behavior toward him. (*Id.*). Kelly never saw this memorandum before he resigned, despite the fact that the memorandum references a "counseling statement" that would have been required to have been reviewed with Kelly. (*Id.*). Prevey testified that the words "counseling statement" were added by Kathleen Bower, not him. (Tr. 730).

Sodium Chloride Incident

The same day Prevey placed a memorandum in Kellys file regarding the thin sheet texture mounting procedure, he placed yet another memo in Kellys file regarding Kellys failure to use the semi-quantitative fluorescence analysis. (Tr. 718). When Prevey noticed the unusual conclusion of the presence of sodium chloride in one of Kellys report he was reviewing, he looked for the elemental analysis and discovered that it had not been done as required by laboratory procedures. (*Id.*). Kelly and Prevey had engaged in several discussions concerning Lambdas elemental analysis procedure, with Kelly unsatisfied with the procedure. (*Id.*). After the elemental analysis was run, no sodium chloride was present, indicating that the report was incorrect. (*Id.*) The report was edited and then shipped to the client, sans Kellys elemental conclusions. (Tr. 720). Prevey viewed the failure to

use the elemental analysis as "insubordination." (Tr. 718). The record demonstrates that the analysis was completed before Kelly issued his report, but it was not so noted on the report submitted to Prevey. (Tr. 722-24).

Preveys Angry Outbursts

From September 1999 through February 2000, Kelly alleges that Preveys angry outbursts became increasingly severe, supposedly in an attempt to pressure Kelly into signing the QAR or to justify his eventual firing. (Complainants Post-Hearing Brief, p. 32). Kelly alleges that Prevey would blow-up over non-events. Kelly further alleges that abusive, foul language was directed toward him, and that Prevey routinely threatened to fire him. Specifically, Kelly recalls that, in a week in September, his job security was threatened every day by Prevey. (CX 25, p. 17).

No witness corroborates Kellys stories of obscenity-laden tirades. Glavicic testified that Prevey would raise his voice, and had done so to him. (Tr. 125). Glavicic, however, testified that he never heard Prevey swear at Kelly. (*Id.*). Perry Mason testified that he never heard Prevey swear or be abusive toward Kelly. (Tr. 900). Barger also testified that he never heard Prevey threaten or swear directly at Kelly, although he had heard Prevey swear. (Tr. 913). Marie Marawi also testified that she never heard Prevey yell or swear at Kelly, nor had she ever witnessed Prevey act abusively toward him. (Tr. 935). No witness, except Kelly, testified to ever perceiving Prevey as physically threatening.

To deal with the various incidents catalogued above, Kelly began the practice of writing resignation

letters and bringing them to work with him, ready to be used if needed. (Tr. 342). Kelly testified to pre-writing his resignation letters after three particularly bad situations. (*Id.*). Kelly overrode all of them, however. (*Id.*) Eventually, Kelly realized he was preparing resignation letters several times a week. (*Id.*). On cross-examination, Kelly testified that it was reasonable to assert that he wrote approximately eight resignation letters during September 1999 that were never submitted to Prevey. (Tr. 437).

Before his September 1999 performance evaluation, Kelly had requested the NRC to perform a technical evaluation of the GEN problem. After Kellys performance evaluation, he requested the NRC to perform a discrimination evaluation of the recent events he had endured. (CX 23, p. 4-7; Tr. 360-61). Kelly later withdrew the discrimination evaluation, primarily because of the risk of losing his job. (CX 23, p. 7; Tr. 362). In addition, the pole figure procedure was changed in early October 1999, and Kelly felt like things may be improving in the lab, further diminishing the need for a discrimination evaluation. (Tr. 367).

On December 16, 1999, Kelly received an answer to his inquiries from the Nuclear Regulatory Commission. (CX 23, p. 11). In their final report, the Commission stated, "[W]e have concluded that the errors resulting from the texture analysis at Lambda Research in the development of engineered components is not a safety concern. NRC did not pursue the issue further since we determined it is not a safety concern." (*Id.*). Despite the NRCs finding of no safety concerns, Kelly persisted in his worries

because he felt like the NRC evaluation was not completely thorough. (Tr. 372). Kelly worried that the NRCs evaluation was limited to the June testing Lambda performed. Kelly admitted that GEN had received a corrected report to let them know that the original results of the GEN test were incorrect. (Tr. 374). Kelly was concerned with past testing and the possibility that some of that testing was subject to the 10 C.F.R. § 21 requirement. (Tr. 375).

On February 16, 2000, the new quality assurance manager, Marie Marawi, brought another version of the GEN QAR for Kelly to sign. That same day, Chris Barger came to Kelly with another zirconium specimen and informed him that the contact cement failed again. (CX 19). Kelly informed Marawi that he could not sign the QAR until he reviewed it. (CX 25). Before he signed the QAR, Kelly attempted to contact Prevey to discuss the contact cement problem. This attempt led to a confrontation in the lab between Kelly and Prevey regarding the efforts of Barger and Kelly on the GEN studies. On February 18, Prevey took the QAR that Marawi had delivered back from Kelly. Because of the confrontation in the lab, Kelly had not had a chance to review or sign the new draft of the QAR.

The QAR next came up for discussion on February 25, 2000 in a meeting between Kelly, Prevey, Glavicic, and Barger. Prevey handed Barger and Kelly two quality incident reports to sign, one of which was the QAR relating to the GEN test from June 1999. (Tr. 416, 680). The other QAR concerned an unrelated project. Prevey indicated that they had five minutes to read and sign the QAR. (Tr. 418). Then, as Kelly was reading the QAR in Preveys

office, Prevey told him that Kelly would sign the QAR before he left his office. (*Id.*). After a period of time, Prevey gave Kelly one hour to look over the QAR and sign it, unedited. (Tr. 418-19). When Kelly reviewed the QAR, he identified, from his viewpoint, three problems: 1) there was no mention of the failure of the peak finding program; 2) there was no indication that any review of older data for the problems that had been identified would be done; and 3) there was no indication that GEN was to be notified of the full extent of the problem with procedures used in past work, which would notify GEN that it should evaluate the problem. (Complainants Post-Hearing Brief, 46-47). Kelly refused to sign the QAR. (Tr. 424). Kelly went back to Preveys office, and, when Prevey asked for the QAR, he handed Prevey his resignation. (Tr. 423, 438, CX 17). At no time did Prevey solicit Kellys resignation.

VI. CONCLUSIONS OF LAW

A. *Applicable Law*

Since this case has been fully tried on the merits, the relevant inquiry is whether Kelly prevailed by a preponderance of the evidence on the ultimate question of liability. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA- 46, Secy Dec., Feb. 15, 1995, slip op. at 9-11, *affd Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996); *Adornetto v. Perry Nuclear Power Plant*, Case No. 97-ERA-16, ARB Case No. 98-037, Fin. Dec. and Ord., Mar. 31, 1999, slip op. at 3. *See also Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8, Secy Dec., Mar. 4, 1996, slip op. at 4-5 n.1. Thus, it must be determined whether Kelly has proven, by a preponderance of the evidence, that he

engaged in protected activity under the ERA, that Lambda Research took adverse action against Kelly, and that Kellys ERA-protected activity was a contributing factor in the adverse action that was taken. *Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power and Light*, Case No. 96-ERA-36, ARB Case No. 98-044, Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 6. See 42 U.S.C. §5851(b)(3)(C). Once a case has been tried fully on the merits, it no longer serves any analytical purpose to address and resolve the question of whether the complainant presented a prima facie case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *Carroll v. Bechtel Power Corp.*, 1991-ERA- 46 slip op. at 9-11 (Secy, Feb. 15, 1995), *affd Carroll v. U.S. Dept. of Labor*, 78 F.3d 352 (8th Cir. 1996).

In order to prevail in a case based upon circumstantial evidence of retaliatory intent, the Complainant must establish by a preponderance of the evidence that the employer was subject to the Act, that he was engaged in activity protected under the Act, that he was subjected to adverse employment action, that Respondent was aware of the protected activity when it took the adverse employment action, and that the protected activity was the reason for the adverse action. *See Trimmer v. United States Dept of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Seater v. Southern California Edison*, 95-ERA-13 at 14 (ARB Sept. 27, 1996). Complainant may carry his burden of proof on any element of a discrimination claim by direct or

circumstantial evidence. *Bartlik v. Tennessee Valley Auth.*, 88-ERA-15 at 2 (Secy Apr. 7, 1993), *affd sub nom. Bartlik v. United States Dept of Labor*, 73 F.3d 100 (6th Cir. 1996). It is not sufficient for Complainant to establish that the Respondents proffered reasons for the adverse action are unbelievable; he must establish intentional discrimination in order to prevail. *See Leveille v. New York Air Natl Guard*, 94-TSC-3 at 4 (Secy Dec. 1, 1995).

Initially, I note that my jurisdiction is limited by law in this case to deciding only whether the complainant was discriminated against because he engaged in protected activity under the ERA. I am limited to deciding only this issue and cannot consider whether the employer acted properly in making decisions unrelated to the complainants protected activity. Likewise, I do not have the authority to decide whether the complainants supervisor acted improperly unless those actions were related to the protected activity under the ERA. My inquiry must focus solely on whether the complainants protected activity was the reason for the adverse actions taken by Lambda Research.

A. *Lambda Research as "Employer" Under the Act*

A necessary element of a valid ERA claim under the employee protection provision is that the party charged with discrimination is an employer subject to the Act. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Employers under the ERA are licensees, or applicants for a license, of the Nuclear Regulatory Commission, and their contractors and

subcontractors. 42 U.S.C. § 5851(a); *Billings v. OWCP*,.91-ERA-35 (Secy Sept. 24, 1991), slip op. at 2; *Wensil v. B.F Shaw Co.*, 86-ERA-15, 87-ERA-12, 45, 46, 88-ERA-34 (Secy Mar. 29, 1990), slip op. at 11, affd sub nom. *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991), cert. denied, 116 L. Ed. 2d 90 (1991);. *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Secy Oct. 26, 1992), slip op. at 8.

The evidence clearly indicates that Lambda Research is subject to the Act. The GEN purchase orders clearly indicate that GEN is subject to the Act, and the evidence of record clearly demonstrates that Lambda acted as a subcontractor to GEN. A subcontractor of an NRC licensee is an employer subject to ERA, 42 U.S.C. § 5851(a). *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Lambdas own procedures included portions of the Energy Reorganization Act. (CX 36, p. 56-57).

B. *Protected Activity*

In a retaliation claim under the ERA, the protected activity must relate to nuclear or environmental concerns or must further the purposes of that act. See 42 U.S.C. § 5851(1)-(3); 29 C.F.R. § 24.2; *Tyndall v. United States Environmental Protection Agency*, 93-CAA-6 (ARB June 14, 1996). To constitute protected activity under the ERA, an employees acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). The ERA does not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Not

every act an employee commits under the auspices of safety is protected under the whistleblower provisions of the ERA. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity under the ERA. *Bechtel Construction Co. v. Secy. of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). However, making general inquiries regarding safety issues does not qualify as protected activity. *Id.*.

The parties dispute whether Complainant engaged in any protected activity by refusing to sign the September and February QAR. Specifically, Kelly alleges three protected activities: 1) Kellys submission of the QAR report in July 1999 recommending various changes in the laboratory originating from problems with the GEN texture analysis; 2) Kellys refusal to make the changes suggested by Prevey and his subsequent re-submission of the QAR without said changes; and 3) Kellys further refusal to sign the QAR in February 2000. Each of these activities will be reviewed in turn. Each action will be reviewed individually.

1. Kellys submission of the QAR report in July 1999 recommending various changes in the laboratory originating from problems with the GEN texture analysis

Kellys submission of the QAR clearly constituted protected activity. A legal dispute whether purely internal complaints or safety reports to management constitutes protected activity under the ERA no longer exists because the 1992 amendments to the ERA explicitly include an employees notification to

his or her employer of an alleged violation of the ERA. *See* Section 2909(a) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3123.

In *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996), the Board found that the ALJ correctly recognized that internal complaints were protected under the whistleblower provisions of the pertinent environmental statutes. The Board observed that an informal and internal safety complaint may constitute protected activity. Slip op. at 5, *citing, Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, slip op. at 10 (Secy Oct. 26, 1992) (employees verbal questioning of foreman about safety procedures constituted protected activity), appeal dismissed, No. 92-5176 (11th Cir. Dec. 18, 1992); *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39, slip op. at 1, 3 (Secy Oct. 30, 1991) (employees complaints to team leader protected).

The scientific soundness of Kellys assessment of the problems does not alter the fact that his initial QAR report and its suggested changes constituted protected activity. The policy underlying the ERA and the employee protections it affords are designed to promote and encourage the full, unfettered flow of safety-related information and safety concerns not only to employers but the NRC as well. Nothing in the language of the Act conveys any intent to restrict its coverage only to those concerns which address actual violations or imminently hazardous conditions. Accordingly, in deference to the policy objectives of the ERA and similar enactments, the precedents which guide this adjudication have not required the ultimate substantiation of the

employees concerns. *Passaic Valley Sewage Commrs. v. Dept. Of Labor*, 992 F.2d 474 (3rd Cir., 1993); *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353 (6th Cir., 1992); *Oliver v. Hydro-Vac Services, Inc.*, 91 SWD 1 (Sec. 11/1/95); *Aurich v. Consolidated Edison Co.*, 86 ERA 2 (Sec. Order, 4/23/87).

It is sufficient that a Complainant have a "reasonable belief" or a "good faith perception," that a potential violation has occurred or might occur or a potentially hazardous situation may exist. *Passaic Valley, supra*; *Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec., 1/25/94); *Yellow Freight, supra*; *Oliver, supra*; *Aurich, supra*. Thus, the courts have specifically protected the disclosure of a "possible violation" even when a subsequent NRC investigation revealed the employee was mistaken. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir., 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir., 1984). In the instant case, Kellys previous work for GEN included the 10 C.F.R. § 21 requirement, and Kellys concern was specifically related to previous work Lambda had performed for GEN. Despite the fact that only a small percentage of the purchase orders received the 10 C.F.R. § 21 requirement (2 out of 21), it was not unreasonable for Kelly to believe that previous work on the purchase orders that did contain the safety regulation may have been affected by the faulty procedures or their execution. Kellys concern was imminently reasonable at this specific point in time.

Respondent argues that Kelly did not engage in protected activity because the GEN QAR submitted in July 1999 did not implicate or communicate to

Prevey that Kelly was concerned about nuclear safety. (Respondents Post-Hearing Brief, p. 6-7, citing *Makam v. Public Service Electric & Gas Co.*, 1998-ERA-22 (2001)). I find this argument untenable. The QAR submitted by Kelly explicitly references the 10 C.F.R. § 21 requirement. (CX 1, p. 3). Furthermore, Kellys July 2, 1999, memorandum to Prevey, addressing the exact same problem, clearly identified that the presence of the 10 C.F.R. § 21 requirement in previous purchase orders from GEN was a driving force in Kellys concern and recommendations. (CX 19, p. 5).

I find that Kellys submission of the GEN QAR in July 1999 was protected activity.

2. Kellys refusal to make the changes suggested by Prevey and his subsequent re-submission of the QAR without said changes

Kellys refusal to make the changes requested by Prevey was not reasonable, and, thus, it was not protected activity. *See Cox v. Lockheed Martin Energy Systems, Inc.*, 1997-ERA-17 (1999). When Kelly spoke with Prevey regarding his recommendations and received the edits by Prevey to the original QAR, Kelly was confronted with sufficient explanations for Preveys changes.

First, Prevey rejected Kellys suggestion to notify GEN of the possibility of pole figure data distortion due to the lack of sample flatness because Prevey believed that the client had already been notified and the data already reviewed. Preveys conclusion was reached because he assumed that Kelly was referring to the 90 degree rotation error that had been detected before the sample mounting error had been located. (Tr. 653-58). Furthermore, Prevey knew that

the data had already been reviewed because it is reviewed in real-time when the reports themselves are generated by comparing the report conclusions with archival data from the round robin exchange of data. (Tr. 686-91). Lambda had already contacted GEN regarding that issue, and thus Kellys recommendation was moot. Prevey assumed that Kelly was referring to the 90 degree rotation problem because he saw no basis for contacting GEN regarding the sample mounting problems on the June purchase order. (Tr. 653-55). Preveys determination that there was no basis to contact GEN had been communicated to Kelly. (Tr. 659-660). Prevey rejected Kellys final recommendation that two procedures being revised to ensure sample flatness because a procedure to ensure sample flatness was already in place. (Tr. 666). If procedures were followed correctly, there was no need to alter the existing procedures. Prevey considered Kellys concern that errors in previous work may have gone undetected as pure speculation. (Tr. 659; 686-91). Preveys explanation to Kelly sufficiently and completely obviates the need to revise the procedures, and Kellys failure to follow Preveys edits and insistence to keep his recommendations in the QAR were unreasonable.

Durham v. Georgia Power Company and Butler Service Group, 86-ERA-9 (ALJ October 24, 1986), is directly on point. In *Durham*, the administrative law judge found that the complainant was not engaged in protected activity when he refused to sign a particular section on a quality control form. The complainant argued that by not signing the form, he was refusing to violate applicable quality control

procedures, and therefore, his suspension was a result of protected activity. Prior to the suspension, the management had explained to the complainant that his signature was required to proceed with work and the signature did not violate or compromise the integrity of the quality control procedures. The administrative law judge noted that, had management requested the complainant to falsify control documents or violate quality control procedures in any way, his refusal would constitute protected activity. The administrative law judge found, however, that there was no request for a falsification of the document nor any compromise of quality control procedures; rather, the complainant merely did not agree with the managements request or explanation. The administrative law judge found that the complainant, after the explanation and before his suspension, knew or should have known that the requested signature would not violate applicable quality control procedures. His refusal to sign the form after such explanation was not protected activity, it was merely refusing to obey a valid order. Accordingly, the complainant failed to establish a prima facie case that his suspension was in retaliation for protected activity.

In the instant case, Kelly was confronted with sufficient explanation as to the requested changes as to render his refusal to edit the QAR mere unwillingness "to obey a valid order."

3. Kellys further refusal to sign the QAR in February 2000

Kellys second refusal to sign the QAR is also not a protected activity.

Beyond Preveys explanation of the requested changes, Kelly was informed in December 1999 that the Nuclear Regulatory Commission [NRC] found no nuclear safety hazard in the sample mounting error that had occurred at Lambda. (Tr. 369, 444; RX 24). Kelly maintains that the NRCs report was incomplete and inadequate. (Tr. 371-72; Complainants Post-Hearing Brief at 40). Kellys chief complaint with the NRCs evaluation of the situation at Lambda was the NRC did not know for what purpose GEN would use the zirconium tubes. (*Id.*). The NRCs report however indicates that, regardless of the end use, no safety issues were implicated because "we believe that texture analysis, in general, cannot be used to inadvertently qualify unacceptable material." (RX 24, p.1). The report stated, "Therefore, we have concluded that errors resulting from the texture analysis at Lambda Research in the development of engineered components is not a safety concern." (*Id.*). *Phillips v. Stanley Smith Security, Inc.*, ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001), affirmed that NRC approval of a procedure or activity does not necessarily render a complainants concerns unreasonable, but that conclusion was based upon the fact that the Complainant in that case suspected intentional deception upon the part of the Respondent with the NRC. No such fact pattern exists in the instant case. The NRCs report, when combined with Preveys numerous discussions with Kelly, should have obviated any concern for nuclear safety that Kelly possessed. I find that to advance that he continued to have such concerns is unreasonable.

C. *Adverse Employment Action*

To constitute an adverse action, Complainant must demonstrate by a preponderance of the evidence that the action had some adverse impact on his employment. *See Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)); *but see DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983))(economic loss is not required for action to be adverse). The governing regulations define discrimination or an adverse employment action very broadly. *See* 29 C.F.R. 24.2(b)("Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, *or in any other manner discriminates against any employee* because the employee has [engaged in protected activity]). Activities

found to be adverse employment actions include, but are not limited to, elimination of position, threats of termination, blacklisting, causing embarrassment and humiliation, constructive discharge, and issuance of disciplinary letters.

In *Graf v. Wackenhut Services, L.L.C.*, 1998-ERA-37 (ALJ Dec. 16, 1999), *pet. for review withdrawn, Graf v. Wackenhut Services, L.L.C.*, ARB Nos. 00- 024 and 25 (ARB Feb. 16, 2000), the administrative law judge found that "[t]he Tenth Circuit liberally defines the phrase adverse employment action and takes a case-by-case approach to determining whether a given employment action is adverse." *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998) (employment action is not required to be materially detrimental). The judge wrote:

> In *Jeffries*, for example, verbal interrogation and reprimand were sufficient to constitute adverse employment actions even though said actions did not actually have an adverse impact on the terms and conditions of the employees employment. *Id.* Other examples of adverse actions include "decisions that have demonstrable adverse impact on future employment opportunities or performances, demotions, adverse or unjustified evaluations or reports, transfer or reassignment of duties, [and] failure to promote." *Fortner v. Kansas*, 934 F. Supp. 1252, 1266-67 (internal citations omitted), affd sub nom. *Fortner v. Rueger*, 122 F.3d 40 (10th Cir. 1997). Nevertheless, it is not sufficient for a complainant to simply testify that he did not like the action or wished that the action had not occurred. *Trimmer*, 174 F.3d at 1103 (citing *Greaser v. Missouri Dept of Corrections*, 145 F.3d 979, 984 (8th Cir. 1998). *See also Fortner*, 934 F. Supp. at 1266-67 ("[N]ot everything that makes an employee unhappy is an actionable adverse action."). Speculative harm will not constitute adverse employment action. *Id.*

Complainant alleges that the adverse employment actions he suffered as a result of his engagement in protected activity was a constructive discharge. (Complainants Post-Hearing Reply Brief, p. 8-13). Within the complainants constructive discharge evidence exists separate incidents which standing alone may constitute adverse actions. After analysis of Complainants constructive

discharge claim, the actions shall be reviewed independently.

1. Constructive Discharge

Complainant resigned his employment on February 25, 2000, but Complainant alleges that Respondent engaged in a pattern of activity so egregious as to render his resignation involuntary.

To establish a constructive discharge:

> the employee must show that working conditions were rendered so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. ... It is insufficient that the employee simply feels that the quality of his work has been unfairly criticized.

Mosley v. Carolina Power & Light Co., 94-ERA-23 (ARB Aug. 23, 1996)(citing *Henn v. National Geographic Society*, 819 F.2d 824, 829-30 (7th Cir. 1987)). *See also Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991)(stating that constructive discharge occurs when employment is "so difficult or unpleasant that a reasonable person in the employees shoes would have felt compelled to resign."). "Constructive discharge" assumes that a complainant was not formally discharged, the issue being whether he or she was forced to resign or whether he or she quit voluntarily. Because a finding of constructive discharge requires proving that working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign, i.e., that the resignation was involuntary, *Johnson v. Old Dominion Security*, 86-CAA-3 to 5 (Secy May 29, 1991), slip op. at 19-22 and n.11, the adverse

consequences flowing from an adverse employment action generally are insufficient to substantiate a finding of constructive discharge. Rather, the presence of "aggravating factors" is required. *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981). Unless constructively discharged, a complainant is not eligible for post- resignation damages and back pay or for reinstatement.

Circumstances held sufficient to render resignation involuntary include a pattern of discriminatory treatment and "locking" an employee into a position from which no relief seemingly can be obtained. *Clark v. Marsh*, 655 F.2d at 1174; *Satterwhite v. Smith*, 744 F.2d at 1382-1383. Transfer from a supervisory position to a "dead-end position requiring [the employee] to do virtually nothing was a form of enforced idleness both humiliating and detrimental." *Hopkins v. Price Waterhouse*, 825 F2d 458, 473 (D.C. Cir. 1987), *revd on other grounds*, 109 S. Ct. 1775 (1989) (constructive discharge occurred where employee subjected to what any reasonable senior manager in her position would have viewed as "career-ending action"). [additional citations omitted].

The Secretary addressed the doctrine of constructive discharge in *Perez v. Guthmiller Trucking Co., Inc.*, 87-STA-13 (Secy Dec. 7, 1988), slip op. at 24-27; *Taylor v. Hampton Recreation and Hampton Manpower Services*, 82-CETA-198 (Secy Apr. 24, 1987), slip op. at 7-9; *Hollis v. Double DD Truck Lines, Inc.*, 84-STA-13 (Secy Mar. 18, 1985), slip op. at 8-9, employing in those cases an objective standard adopted under antidiscrimination legislation. *See Simpson v. Federal Mine Safety &*

Health Rev. Comn, 842 F.2d 453, 461-463 and nn.8, 9 (D.C. Cir. 1988); *see also Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991)(applying objective standard test in determining constructive discharge). In *Taylor v. Hampton Recreation*, the Secretary concluded that the employees resignation was coerced where he had endured a pattern of abuse by his immediate supervisor, the supervisor repeatedly had refused to provide him with guaranteed job training, the confrontations and threats of imminent discharge adversely affected the employees health, and top management had manifested insensitivity and a marked lack of response to the employees grievances and requests for assistance.

The record does not support the complainants allegation of constructive discharge. The record does reveal certain facts, however. First, there is no question that Prevey was a demanding boss. Several witnesses testified to this. There is also no question that Prevey occasionally yelled at his employees. Prevey admitted to this under oath. Those conclusions, however, are the extent to which the record yields negative evidence about the work environment at Lambda Research. None of the specific examples that Kelly advances as demonstrative of a working environment "so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign" withstand the scrutiny of the weight of the evidence. Kelly advanced that Prevey unreasonably shortened the delivery time on the Western Zirconium project, but the evidence clearly demonstrates that the reduction in time for the project was at the clients

request. Furthermore, there is no indication that this *one* example of a shortened deadline made completion of Kellys jobs on a daily basis impossible or unduly burdensome.

Kelly alleges that Preveys reaction to the Specs Milling machine incident was unreasonable, but no other employees who witnessed that incident corroborate Kellys allegations of swearing. Furthermore, Kelly admits that the ultimate responsibility and failure rested with him, and Preveys notation of Kellys response in his personnel file is patently reasonable.

Kelly alleges his responsibilities were decreased with the intervening presence of Glavicic in the lab, but there is no indication that Glavicic was in the lab to overtake Kellys job, beyond Kellys assumptions based upon what he perceived were Preveys tactics with previous employees. I grant Kellys perceptions on this issue little weight. Glavicic and Prevey testified that Glavicic was not there to overtake Kellys job, asserting that the only reason for his presence was to move backed-up work out of the lab. Testimony does reveal that the lab was busy, and that QA checks were more difficult with only two people. However, the record clearly reveals that the size of the lab fluctuated over time, and that events conspired in the lab to reduce its personnel that were out of the control of Prevey, such as Shoemakers resignation to follow her husband to another job. To the contrary, in the time period between Kellys refusal to sign the QAR in September 1999 through his resignation, Prevey seemed to support Kellys responsibilities in the lab by giving him bonuses, following some of his suggestions, and taking him to

Colorado to a seminar on x-ray diffraction. There is simply no indication that Prevey was acting to fire Kelly.

The crux of Kellys constructive discharge argument appears to be that Prevey was rude and irrationally cruel to Kelly. The record supports Kellys allegation that Prevey was a tough person to work for, who occasionally lost control of his temper, but no evidence demonstrates a working environment "so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign." It is clear that Kelly and Prevey engaged in heated arguments. These types of arguments, however, are not uncommon to the work force, especially in the private sector where the demands of the market push companies to produce quality products in little time. There is no evidence that any of the "angry outbursts" of Prevey crossed the line, albeit they may be indicative of an inordinate lack of control. The record indicates that Kelly was not alone as a target of these "outbursts." Glavicic and Barger both testified to witnessing such outbursts; Glavicic admitting to being the recipient of some. At times, the heated exchanges were brought on by Kellys actions. Kellys failure to follow the fluorescence analysis procedure and his reaction to Preveys inquiry into maintenance responsibilities would reasonably draw harsh responses from employers seeking compliance with rules and procedures. Other times, such as the developer solution incident, the word processing template incident, and the timecard incident, it appears as though Prevey lost control of his temper before he had a complete understanding of the situation. A loss

of temper, however, does not produce a working environment "so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign." If it did, almost every American worker has likely been constructively discharged. That non sequitur speaks for itself.

The record does not support Kellys allegation that he was threatened with physical harm. Preveys testimony concerning his recitation of a safety incident occurring years earlier in the lab necessitating his possession of a gun at the lab one night makes any belief that Prevey had a gun at the lab at all times unreasonable. Kelly himself denies such a belief, but advances that Preveys casual references to "shooting" are indicative of Preveys treatment of him. I find Kellys testimony on this subject lacking credibility and I afford it no weight.

Kelly asserts that a change in company policy allowing only final reports to be sent to clients is further evidence of a work environment that is "so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign." Kelly believed this action was to stifle his efforts to contact GEN regarding the zirconium testing. This assertion is unsupported by reason and case law. *See Mosbaugh v. Georgia Power Co.*, 91-ERA-1 at 9 (Secy Nov. 20, 1995)(not an adverse action when complainant was treated like other similarly situated employees under company policy); *Moody v. Tennessee Valley Auth.*, 91-ERA-40 at 2 (Secy Apr. 26, 1995). As the policy was company-wide, it cannot be an "adverse action" in retaliation for protected activity.

Kelly also points to his lower performance evaluation and his small third-quarter 1999 bonus as evidence that Prevey was making it impossible to succeed. Any evidence of wrongdoing that Kelly argues flows from his third-quarter bonus has been completely obviated by evidence in the record that 1) Kelly received a large December 1999 bonus *after* his third-quarter bonus and, more importantly, 2) Kellys *low* third-quarter bonus was a product of his own discretion, not Preveys. Any argument that Kellys third-quarter bonus evinces retaliatory animus is a misrepresentation.

Kellys September 1999 performance evaluation was markedly lower than his July 1999 evaluation. Two factors contribute to this result. First and foremost, Kellys September evaluation was the first evaluation that Prevey had been afforded the opportunity to supervise Kelly the entire evaluation period. Secondly, as Prevey testified, Prevey is historically easier on his first evaluation as a way of promoting better performance. Kelly did rank lower on eight of the fourteen categories in his September evaluation compared to his July evaluation, but the marks are not substantially lower. Furthermore, no tangible detriment redounded from the lower review. Kelly was not put on probation, denied bonuses, or placed on a performance improvement plan. *See Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001) (holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action).

While Kellys cross-examination of Prevey did demonstrate that there seemed to be little basis for his attendance to be graded harsher than after his

July 1999 review, there is no evidence that this was not a simple, unintentional mistake. Preveys explanation on this particular mark is neither coherent nor satisfactory, but it also fails to evince any discriminatory intent. (Tr. 774). The scaled grades for the attendance section (Outstanding, Very Good, Satisfactory, Below Average, and Unsatisfactory) do not include objective criteria, such as limiting an "Outstanding" rating to those employees with one or less absence. The criteria are subjective. Furthermore, Kelly still received a "Very Good" rating, literally and figuratively. There exist a myriad of explanations for the loss in grade, the vast majority of which evince no discriminatory intent, such as 1) Prevey was a tougher grader after the first performance review, 2) Prevey did not refer to the attendance sheet in his assessment, or 3) Preveys criteria for judging attendance of his supervisors toughened over time. Prevey himself admitted he was a "demanding" boss, but "fair." (Tr. 850). Marie Marawi also testified that Prevey was demanding but fair. (Tr. 934). Prevey admitted that the marks are necessarily subjective. There is absolutely no evidence that the lower September evaluation moved Kelly any closer to a suspension or a discharge. I will weigh the evidence of the lowered attendance marks, despite what appears to be "improved" attendance for Kelly, as circumstantial evidence of discriminatory intent, but I will grant it little probative weight as the context of the performance evaluations and Preveys explanations sufficiently convince me that this "evidence" of discrimination is entitled to little weight.

Furthermore, the four memoranda placed in Kellys personnel file without his knowledge could not have contributed to making the work environment "so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign." As Kelly did not know the memoranda existed, the memoranda could not have contributed to how Kelly perceived his work environment. While the documents are evidence of Preveys problems with Kellys work performance, they cannot serve as direct proof of constructive discharge without Kellys knowledge of them. *Cf. Doria v. Cramer Rosenthal McGlynn, Inc.*, 942 F.Supp. 937, 947 (D.D.N.Y. 1996).

Kelly argues that Preveys time limitations on his signing of the QAR on February 25, 2000 placed him in the impossible position of either signing what he considered a QAR that covered up problems or, conversely, resigning. It is true that intimidation and coercion brought to bear on a complainant to rescind a health or safety complaint constitutes adverse employment action. *Nathaniel v. Westinghouse Hanford Co.*, 91- SWD-2 (Secy Feb. 1, 1995), slip op. at 13. In the instant case, however, no such intimidation or coercion was wrought upon the complainant. No ultimatums were issued. Complainants job security was not threatened. He was not told that he would be fired or demoted if he did not sign the QAR in the time allotted. Preveys testimony reveals that he was tired of the issues surrounding the GEN QAR, and the objective evidence supports Preveys assessment of the lack of a safety issue in the results sent to GEN, as all other results had comported with the round robin results and were checked in real-time as the

reports were generated. The only report that did not comport was the June sample, and GEN had already been notified of the sample mounting problem with that particular project. Furthermore, Prevey has established that if the existing procedures were followed correctly, there was no need to change them as Kelly advanced. It was simply repetitive. Kelly was confronted with this evidence, but chose to ignore it. Kellys obstinance in maintaining his opinion does not transform Preveys demand to sign the QAR into an adverse employment action.

Prevey was correct in his assessment of the safety situation, as demonstrated by the NRCs December report. Preveys action of demanding a signature on the report was simply an employer reaching a final decision about a problem and refusing to waste more time on a non-issue. As Kelly was not threatened with any tangible detriment and was merely given a time period to sign the QAR, Preveys time limitations were not adverse employment actions. Furthermore, Preveys actions were no more intimidating or coercive than any employers demand that employees finish certain uncomplicated tasks within a reasonable time frame. As Prevey had on several occasions discussed and considered Kellys recommendations, his demand to sign the QAR was not an adverse employment action, but, rather, was imminently reasonable. *See Durham v. Georgia Power Company and Butler Service Group*, 86-ERA-9 (ALJ October 24, 1986).

Any intimation on Kellys behalf that Preveys time constraints on his signing the QAR in February 2000 was a mere continuation of his September 1999 threat of firing Kelly if he wasted any more time on

the QAR is 1) attenuated by the intervening five months to such a degree as to render the February confrontation a separate and distinct event, and 2) obviated by the simple fact that Preveys continual allowance of greater time for Kelly to review the QAR indicated a willingness to allow Kelly to spend more time on the issue. Furthermore, I find Preveys assertion that he had no intention of firing Kelly on February 25, 2000, credible.

I affirm that the record demonstrates Preveys quick temper and abrasiveness, but such choleric outbursts seem to be directed at employees in general and not Kelly in particular. Furthermore, Kelly presents no evidence that comes close to demonstrating that he was subjected to such intolerable conditions that, as a reasonable person, he was left with no other option but to resign. Kelly was never demoted; his salary was not reduced; his title was not changed; and his responsibilities remained constant. There exists no evidence of aggravating factors targeted directly at Kelly which "cornered" Kelly, allowing him no option but to resign. His engagement in heated exchanges with Prevey alone fails to rise to the standard for constructive discharge.

2. Disciplinary Action

Four letters were placed in Complainants personnel file during his employment at Lambda, none of which he had any knowledge of their existence. The letters served as "mental notes" for Prevey concerning events that occurred in the laboratory. (Tr. 850). The letters did not result in any suspension or termination of Kelly, but, even though a disciplinary letter does not result in a firing or demotion of a complainant, such drastic action is not required to

render such a letter adverse. *See, e.g., Self v. Carolina Freight Carriers Corp.*, 89-STA-9 (Secy Jan. 12, 1990), slip op. at 15 (warning letters that "served to progress [the c]omplainant toward suspension and discharge" adversely affected him even though the letters did not result in suspension or discharge); *Helmstetter v. Pacific Gas & Electric Co.*, 86-SWD-2 (Secy Sept. 9, 1992).

There is, however, no objective evidence that the letters served to light the path towards termination for Kelly. Prevey testified that he had no intent of firing Kelly or forcing him to resign on the day he resigned, and that to do so would have hurt the company. (Tr. 863). Furthermore, there was no formal system in place at Lambda Research where such a document could objectively serve as ammunition for an impending suspension or termination. In addition, Kellys employment was affected in no way by the letters, as the only individual aware of the presence of the letters was Prevey. A negative performance evaluation, absent tangible job consequences, is not an adverse action. *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001).

3. Kelly threatened with termination if he pursued his QAR concerns

After Prevey recognized that Kelly had failed to implement Preveys edits of the first QAR draft into the second draft, Prevey threatened to fire Kelly if he pursued his concerns or spoke to anyone in the lab concerning the safety issues Kelly believed to be present. This is unequivocally an adverse employment action. *See Graf v. Wackenhut Services, L.L.C.*, 1998-ERA-37 (ALJ Dec. 16, 1999), pet. for

review withdrawn *Graf v. Wackenhut Services, L.L.C.*, ARB Nos. 00- 024 and 25 (ARB Feb. 16, 2000)(threats of disciplinary action and attempts to solicit Complainants compliance with Corrective Action Plans were adverse employment action). The governing regulation itself speaks to threats. *See* 29 C.F.R. § 24.2(b) (prohibiting employer action that "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against" an employee). Preveys threat to fire Kelly was an adverse employment action.

D. *Nexus Between Protected Activity and Adverse Employment Action*

The evidence demonstrates that Kelly suffered an adverse employment action after his protected activity of reporting his safety concerns with the GEN project. Once the complainant has demonstrated that 1) he engaged in protected activity and 2) suffered adverse employment action, he must establish a nexus between the protected activity and the adverse employment action. *See Bartlik v. United States Dept of Labor*, 73 F.3d 100 (6th Cir. 1996). The complainant establishes such a "nexus" if he demonstrates that his engagement in protected activity was a "contributing factor" to the adverse employment action. *See* 29 C.F.R. Part 24.7(b) ("[A] determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."); *Paynes v. Gulf States Utilities Co.*, ARB No. 98-045, ALJ No. 1993-ERA-47 (ARB Aug. 31, 1999). The record, however, evinces no such nexus.

When the evidence of threat of termination is reviewed, I find that there is no nexus between Kellys submission of the original draft of the GEN QAR and Preveys threat of termination.

Preveys threat of termination came after Kelly had submitted a second draft of the GEN QAR. Kelly had failed to make the changes Prevey outlined, despite conversations with and explanations from Prevey as to his reasons for making the changes. When Prevey recognized that the changes had not been completed, he was angry and immediately informed Kelly to stop wasting time on the QAR. The evidence indicates that Preveys anger was not directed at the initial filing of the QAR, but rather the refusal of Kelly to make the changes after Prevey had explained the lack of necessity to implement Kellys recommendations. Kelly himself admits this motivation, stating, "[H]e [Prevey] just didnt want me wasting any more time on this QA incident report." (Tr. 271).

I find it significant that Prevey had no hostile reaction to the QAR when it was first filed by Kelly. When chastising Kelly for his failure to make the changes in the QAR, Prevey at no time questioned the appropriateness of Kellys original concerns and original memorialization of those concerns in the GEN QAR. If Prevey had questioned why Kelly wasted time in filing the *initial* QAR draft or berated Kelly for causing trouble in the first place, then the existing evidence would indicate by a preponderance of the evidence that Kellys initial filing was a "contributing factor" to Preveys adverse action of threatening Kellys employment. No such evidence exists, however. Accordingly, I must conclude that no

nexus exists between Kellys original filing of the QAR and Preveys threat of termination.

VII. CONCLUSION

The evidence of record reveals that Mark Kelly engaged in protected activity by initially reporting his safety concerns to his employer, Lambda Research, and suffered the adverse employment action of a threat of termination. The evidence of record does not reveal, however, any nexus between Kellys protected activity and the adverse employment action he suffered by a preponderance of the evidence. Kellys filing of the initial QAR was not a contributing factor in Preveys threat of termination. Accordingly, the complainant has failed to carry his burden, and his complaint must fail.

RECOMMENDED ORDER

The complaint by Mr. Mark J. Kelly of discrimination under § 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, as amended, is DISMISSED.

S/_____

JOSEPH E. KANE
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be

served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. § § 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1] I deny Respondents Motion to Strike, and, accordingly, I consider Mr. Kellys "Supplement to Brief: Complainants Rebuttel [sic] of Respondents Facts." The document is merely a supplement to the complainants reply brief; it is not a supplement to the post-hearing brief due weeks earlier, as Respondent contends. I grant that Claimants organization of his brief lacked the polish of an attorney. However, as Mr. Kelly represented himself and the document is clearly an addition to his reply brief, I deny Respondents motion to strike, and I will accord the brief due consideration.

[2] In October, the procedure was changed to compensate for the errors in the peak finding program. (Tr. 261).

US Department of Labor Notification of Results of Initial Investigation dated Jul. 27 2000

Occupational Safety and Health Administration
Cincinnati Area Office
36 Triangle Park Drive
Cincinnati, OH 45246-3411
(513)841-4132

Mark Kelly
10955 South Fork Rd.
Dillsboro, IN 47018

Represented By: Steven L. Schiller
200 Lawyers Building
4 West Fourth St.
Newport, KY 41071

Re: Lambda Research/ Kelly/ 26708

Dear Mr. Kelly:

This is to notify you of the results of the investigation in the above noted case, in which you alleged violations of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 USC 5851. Our initial efforts to conciliate the matter did not result in a mutually agreeable settlement. A fact finding investigation was then conducted. The investigation did not verify that discrimination was a factor in the actions comprising your complaint.

Consequently, it is determined that your allegations cannot be substantiated for the following reasons:

You alleged you were force to resign (constructive discharge) because Respondent did not notify GE Nuclear of problems, Respondent tried to force you to sign an incorrect report, you did not receive your proper bonus in Nov 99, Respondent was training another person to replace you and because of the working environment Respondent was causing you to work in. These allegations could verified. Respondent was notifying GE Nuclear of problems, your bonus was proper with the way it was calculated, it could not be substantiated that Respondent threaten you about signing the report.

This letter is notification to you that, if you wish to appeal the above findings you have the right to a formal hearing on the record. To exercise this right you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by facsimile, overnight/next day delivery mail or telegram to:

Chief Administrative Law Judge
US Department of Labor
Suite 400, Techworld Building
800 K Street
Washington DC 20001-8002
(202) 633-0341

APPENDIX: Other Materials

ALJ Complainant's Exhibit 1 p .1 (CX 1 p 1)
Lambda Research QA Incident Report
Procedure: GE Nuclear Sample Prep and Texture Analysis of Zircaloy-2 Plate and Tube Samples
Procedure No: 3P1066(3P1016)
Equipment: H Reported by: Mark Kelly
Project No: 5-8728,5-8796
Responsible Tech: CB, MK
Description of Problem: See attached.
Describe cause: See attached.
Describe solution: See attached.
Actions to be taken: See attached.
Supervisor Signature:
/S_____ (Mark Kelly) Date: 7/16/99
Employee Signature:
/S_____ (Chris Barger) Date: 7/16/99
Director Signature: Date:

CX 1 P 2.
Lambda Research QA Incident Report, 7/15/99
Attachment 1.
Description of the Problem: A specimen from sample 986985-01 was not prepared properly. This introduced errors in the pole figure data, which distorted texture analysis results reported in Lambda Report 5-8728. Because the pole figures and texture analysis results looked atypical, the client requested that Lambda recheck the analysis. Lambda confirmed and reported to the client in Lambda Report 5-8796 that the original results reported in 5-8728 were in error.
Describe cause: The specimen was not flat enough to align the specimen with the sample holder

reference surface well enough to collect good pole figure data when the glass alignment procedure in 3P1016 is used. The greatest deviations from flatness occurred because the technician did not follow the directions for use of the contact cement required by 3P1066. Epoxy was used to help hold the sample in place, which is not part of the procedure. Because the specimen was wavy, high spots on the sample were aligned with the sample mounting ring reference surface when a glass plat was used to position the specimen. The research engineer and the technician did not recognize this positioning problem. Because most of the examined region on the sample was not positioned properly, the program Polfig did not find an appropriate two-theta angle for the (00.2) data collected and prompted for entry of an angle. The technician entered the angle listed in the technique file: it was at nearly the same angle as the peak he observed in a two theta scan of the specimen. Because the angle was not appropriate, measured intensities were too low at low tilt angles and too high at high tilt angles. The distortions were particularly large for the (00.2) pole figure. This caused distortion of the texture analysis. Two observations support these conclusions. First, when Polfig was run with a flatter specimen prepared from the same sample using only the contact cement according to the instructions required by 3P1066, the program found the peak and the pole figure appeared to be normal. Second, when the original wavy specimen was run after aligning the flatter center of the specimen rather than raised portions with the reference surface, Polefig found the peak and generated pole figure data that appeared to be normal.

Describe Solution:

1) Flat specimens must be prepared and positioned correctly. Technicians must follow the procedures and instructions and be trained to prepare flat specimens.

2) The technicians and research engineers must be able to recognize if a specimen is not flat enough to obtain accurate pole figure data. The current pole figure procedure 3P1016 requires that samples be flat within 0.002 inches. Due to the spring-like properties of the thinned tube samples, the current sample preparation method described in 3P1016 produces specimens that are not flat within 0.002 inches. Specimens appear to have raised areas whose heights vary by more than 0.002 inches, making appropriate sample positioning using the glass plate method in 3P1016 problematic. Currently, evaluation of specimen flatness is not performed in the lab.

Actions Taken or to be taken:

1) The client, GE Nuclear has been issued report 5-8796, which includes corrected data for 986985-01 and a description of the problem for this particular specimen.

2) Since its possible that this problem has occurred in the past and was not recognized, previous results of zircaloy tube analysis should be reviewed in order to determine if this problem has caused significant distortion of texture analysis results.

3) *(HANDWITTEN EDIT BY PREVEY)"...was notified data were reviewed. See attached list".*

LINED OUT ORIGINAL TYPED TEXT

~~The client should be notified of the possibility of pole figure distortion due to lack of sample flatness and~~

~~positioning so that they can assess the significance of the problem. This is required by their PO per 10CFR21.~~

4) *(HANDWRITTEN EDIT BY PREVEY)* ***"Already present."***

(TYPED TEXT --LINED OUT BY PREVEY)

~~3P1066 and/ or 3P1016 should be revised to ensure production of flat specimens and verification that specimens are sufficiently flat and appropriately positioned for texture analysis. Directions for entry of appropriate peak positions when the automatic peak finding file fails should be addressed in the procedure~~.

Technicians and engineers will be trained to ensure that they execute the procedures properly.

CX 1 Pg. 5 (the "attached list" email Prevey added to the 7/16/99 QAR).

From: LABSYS/Michael
Subject: Incorrect ODF analysis
To: Paul Xto: Paul
Date: 19 Apr 99 10:24:52 X-pmrqc: 1
Paul
I read the reports in question have checked the inverse pole figure, the best I can for several projects.'605-7279 **Is OK**. This is the project which Perry and Keith billed hours to.
74-8057 **Is definitely wrong.** Based upon the Inverse pole figures and the (0002) pole figure an extra 90 degree rotation was performed.
674-8321, -8235, -8151, -8017 Lee Semiatin - WPAFB all had spotty pole figures with a "fibre" texture making it difficult to judge by the pole figure if a mistake was made, but the inverse pole figures are

not the same in the transverse and reference direction. **Since Perry did the work on these I would assume that these were rotated as well, making the inverse pole figures denoted by "1" and "2" incorrect and features in "3" skewed.** _88-7712 **Is definitely wrong.**
Since WPAFB will be informed by Allied signal I **will verify that the incorrect rotation was performed**. If so I will begin to regenerate the data at least in the reports above.
Also, how are we to inform the customers of the mistakes made.
Also, since I need to post my hours daily, how do I post the one I am spending lookin at these projects.

CX 1 Page 9
Lambda Research QA Incident Report
Procedure: XRD Schulz Back-Reflection Pole Figure
Procedure No. 3P1016, 3P1066
GE Nuclear Sample Prep & Texture Analysis
Equipment: Reported by: client
Project No.: 5-8728 **Responsible Tech:** C. Barger, M.Kelly, M. Glavicic. **File No** 8728
Date: Proj. initiation 05/11/99. Report 06/10/99
Specimen ID: 9886965-01 Time:
Description of Problem: During pole figure generation for the project, specimen 986985-01 was not mounted in the pole figure device properly. This introduced errors in the pole figure data, which distorted the texture analysis results. Because the pole figures and texture analysis results looked atypical, the client requested that Lambda recheck the analysis.

Describe Cause: The specimen was not flat enough to align the specimen with the sample holder reference surface well enough to collect good pole figure data when the glass plate alignment procedure in 3P1016 was used. The greatest deviations from flatness occurred because the technician did not follow the directions for use of the contact cement required by procedure 3P1066. (See back for detailed description).
Describe solution: Flat specimens must be prepared and positioned correctly following the appropriate procedures. The technicians and research engineers must be able to recognize when pole figure data has not been properly collected on the diffraction peak and to determine when a specimen is flat enough to obtain accurate pole figure data. (See back for detailed description.)
Actions to be taken: The client, GE Nuclear, was notified and issued report 5-8796, which includes corrected data for 986985-01 and a description of the problem for this particular specimen. Technicians and engineer will be trained to recognize and correct the problem. Better bonding methods, including hot glue will be investigated
Supervisor Signature: _____ Date: _____
Employee Signature:/S__Chris Barger Date: 2/25/00
Director Signature: /S___Paul Prevey Date: 2/25/00
(HANDWRITTEN NOTE at bottom) Mark Kelly refused to sign. 2/25/00

CX 1 pg. 10. 2/25/00 QAR Attachment (Partial)
Describe Solution... Due to the spring-like properties of the thinned tube specimens, the current

sample preparation method described in 3P1016 produces specimens that **are not flat** within 0.002 inches, making appropriate sample positioning using the glass plate method in 3P1016 problematic. **Currently, evaluation of specimen flatness is not performed in the lab.**

CX 19 pg. 1 Lambda Email.
From: LABSYS/PERRY
Subject: US Steel questions about texture
To: MARKK **X-To:** Markk Date: 4 March 99
Only comment I can make is that everything was done the same way. So I sould think that if there is a 90 deg. Rotation in D--then **all others are also wrong.** Perry

CX 23 pg 13. NRC Report sent 12/16/99
Allegation NRR-1999-A-0057
CONCERNS 1 THRU 3
TEXTURE ANALYSIS OF ZIRCONIUM ALLOY
CONCERN 1
X-ray diffraction texture analysis of zirconium alloy tubing performed at Lambda Research Laboratory are in error and distorted results may have been reported to clients like GE Nuclear. He also suspects other clients like Westinghouse Bettis and Western Zirconium may be involved. Written procedures at the laboratory were not followed, and some simply cannot be followed, because of the problems with the procedure, training, and software.
NRC RESPONSE:
The area of texture analysis is very specialized and requires that proper sample preparation, procedures, personnel training and equipment are utilized to produce accurate results. As noted in a

1982 paper, "Texture Measurement Techniques for Zircaloy Cladding: A Round-Robin Study," which was published by J. E. Lewis et al in the Fifth Conference on Zirconium in the Nuclear Industry, there are many areas that require careful consideration when performing texture analysis. These areas include proper specimen preparation with particular attention to the flatness of the specimen, proper specimen alignment on the goniometer axis, diffraction focusing circle, and selection of the correct 2-theta peak, among other things.

As noted in your September 12, 1999 letter to NRC and other supporting documents, Lambda Research seems to have had some problems controlling the flatness of the specimen and identifying the correct 2-theta peak position prior to conducting texture analysis. These deficiencies were reported by the alleger to have resulted in "distorted" intensity distributions and this has been substantiated. Lambda Research also produced pole figures on several occasions which were indicative of a 90-degree specimen rotation problem. However, it seems that Lambda's clients were cognizant of this type of error and requested that Lambda repeat the analysis. Overall, these problems are indicative of the need for better training of Lambda Research's personnel who prepare the specimens, run the equipment and acquire the data.

With respect to the deficiencies in specimen preparation and the texture analysis technique (ie, identification of the correct 2-theta peak position), we believe that the alleger is making every attempt to correct the situation and produce more accurate, consistent data. Adherence to the most recent ASTM Standard E 81-96, "Standard Test Method for

Preparing Quantitative Pole Figures", which contains up-to-date procedures for conducting texture analysis with modern x-ray diffraction equipment, may help to prevent these types of problems in the future. Further, the references provided at the end of this document may be useful for making comparisons between Lambda Research's data and other data sets regarding the texture of various zirconium materials.

Since the area of texture analysis is very specialized, we consulted with two experts in this field. One of the interviews was conducted with a materials science and engineering professor who has published many papers on the texture analysis of zirconium-based alloys. The second interview was conducted with a senior engineer of one of the major nuclear fuel fabrication companies who has experience in texture analysis from a fuel cladding design perspective.

These two experts stated that the generation of "bad data" and/or "distorted results" can be attributed to many sources, including poor sample preparation, inexperienced analysts or technicians, and inadequate control of the data acquisition equipment and procedures. However, they believed that the techniques employed for texture analysis cannot inadvertently be used to qualify substandard material. In other words, the data from a properly prepared specimen, using equipment that has been adequately prepared for texture analysis, will produce results that are representative of the specimen's (or material's) texture. For example, on expert conclude that, using the basil direct pole figure, substandard material could be identified if the peak intensities and/or the locations of the peak

maxima were outside their acceptable ranges. Thus, if the texture analysis were conducted on "good material" but the specimen were poorly prepared (eg the surface is rough or wavy), the texture analysis results would tend to have characteristics that could indicate the material is "unacceptable". Alternatively, if the texture analysis is performed on poor quality material, the characteristics of the data would show the material is poor. Both experts believed that texture analysis, alone, cannot be used to determine the intrinsic mechanical properties of zirconium-based tubing material. Rather, as one expert suggested, texture analysis can be used to estimate mechanical properties relative to certain directions of the tubing (eg, the results of a texture analysis may show that the tensile strength of the tube in the axial direction is larger, or smaller, than the tensile strength in the radial direction).

We are unsure how GE Nuclear or Lambda Research's other clients use the texture analysis results. However, one of the experts stated that his company does not conduct texture analysis, ie direct pole figures, on a routine basis to evaluate characteristics of the tubing. The texture analyses are conducted typically as part of an evaluation of new product material or a new manufacturing process. Alternatively, his company employs a test that evaluates the contractile strain ration (CSR) as a check on the control of the tubing manufacturing processes. Then, the mechanical properties of the cladding are correlated to the CSR. When the calculated CSR is found to be within a specified range, the mechanical properties of the material are found to be acceptable. In addition to the CSR, the expert's company also performs a tensile test to

evaluate the mechanical properties of the cladding on a per lot basis.

In summary, the problems associated with Lambda Research's texture analysis, we believe, stem from poor control of specimen preparation, training, software and texture analysis procedures. These deficiencies resulted in "distorted" intensity distributions, and this has been substantiated. However, we also believe that texture analysis alone cannot be used to inadvertently qualify unacceptable material. The intrinsic mechanical properties of zirconium-based tubing material cannot be determined from texture analysis. We have concluded that errors resulting from the texture analysis at Lambda Research in the development of engineered components is not a safety concern. Therefore, the NRC did not pursue whether distorted results were reported to Lambda's clients.

CONCERN 2: The owner of the company repeatedly refused to allow the alleger or anyone else to review the past zirconium alloy texture reports and data, which could determine if the problems with the analyses have caused bad data to be reported to the clients.

NRC Response: Based upon our response to Concern 1 and our determination that the issues involved were not safety significant the NRC will not pursue this concern.

CONCERN 3: Fear of Retaliation. The alleger believes, if the owner of Lambda Research were to find out that he discussed these concerns with the NRC, GE Nuclear, or other clients, he would probably make changes.

NRC RESPONSE: On September 30, 1999, we had a conference call with you to gather information

relating specifically to a potential discrimination issue you identified to us on September 29, 1999. On October 9, 1999, we had a follow up conference call to identify the agent assigned to the investigation and to schedule an interview. We explained that an investigation by our Office of Investigations into your allegation of discrimination by Lambda Research could not be pursued without your approval to release your identity. During our conversation, you requested NRC to put the discrimination investigation on hold, but pursue the technical allegations. Based upon you request the Office of Investigations will not pursue your allegation of discrimination. Therefore, NRC does not plan on taking any action on this concern.

CX 36 p. 29. (From GEN Audit records, partial.)

NIAC AUDIT CHECKLIST
SECTION 1- PROGRAM COMPLIANCE
SUPPLIER: Lambda Research Inc.
AUDIT NO. 9062-5333 PAGE 8 of 36

METHOD OF VERIFICATION
1.1 Verify that measures are established and implemented to assure that conditions adverse to quality are promptly identified and corrected. These measures shall include as a minimum:
a) Identification and description of the condition adverse to quality. b) Determination of the cause and actions taken to prevent recurrence for significant conditions adverse to quality:
c) Review and approval by responsible authority on the adequacy of the corrective action: d) Follow-up

action for close-out to verify that the corrective action has taken place or is scheduled.
Appendix B: ANSI N1 45.2 ref: (16,17) ASME Section III NQA Basic Requirement 16. Vendor Program Ref: QAM #1 Section 6.5 and QA Manual #3
RESULTS S
ASSESSMENT-SUMMARY
a) Blue tagging system and Internal Audit Reports.
b) Documented on Malfunction Report by the lab technicians and **QA Incident Report** by the Director of Research. Verified: Malfunction Report Machine A, Dated 03-30-99. **QA Incident Report**, Dated 12-28-98, Project #802-8277.
c&d) Per the Technician or Director of Research.

CX 36 p. 40 (GEN audit record)
QUALITY ASSURANCE AUDIT REPORT
AUDIT NUMBER: 9062-533
I. SUPPLIER: Lambda Research, Inc. 5521 Fair Lane Cincinnati Ohio 45227-3401 Phone: 513-561-0883 Fax: 513-561-0886
II. AUDIT DATES: April 08, 1999
III. AUDIT SCOPE: Audit Type: NIAC Standard Audit Checklist. Revision 2. 06=18=98. Product: Crystallographic **texture analysis of Zircaloy tube** and strip materials by X-Ray diffraction. Checklist **QA Requirement: 10CFR50. App. B. 10CFR21**. ANSI N45.2. Supplier QA Requirements: Lambda Research Inc. Quality Manual. Revisions 05-18-95.
IV. AUDIT TEAM: Lead Auditor: Victor P. Drewnowski.
V. PREAUDIT ORIENTATION: GE-NE personnel requested an audit to be performed on Lambda Research Inc. with emphasis on evaluating

their capability as a Testing Laboratory. Instructions from GE-NE included utilizing the provided Nuclear Industry Assessment Committee (NIAC) standard.
Supplier Contacted: Perry W. Mason- QA Administrator. Paul S. Prevey- President. Salyer Coray- Technician. Mark Baird- Technician.

CX 36 p. 51. GNF/GEN Letter to Lambda
Global Nuclear Fuel- Americas Jan 21 2000
A Joint Venture of GE, Hitachi, &Toshiba
R. J. Mack, Manager Purchased Material Quality Control PO Box 780 Mail Code B79 Wilminton, N. C. 28402 Phone 910-675-5362 Fax 910-675-5872
January 10, 2000
Quality Manager Lambda Research Inc. 5521 Fair Lane Cincinnati, Ohio 45227 Dear Sir/ Madam:

The purpose of this letter is to request your assistance in providing GE with information on your company's program for implementing NRC Rules and Regulations 10CFR Part 21: Reporting of Defects and Noncompliance. Your inputs are requested on or before January 28, 2000.
Background: For many of the materials, components or services purchased by GE, federal regulations require that GE notify its suppliers of the requirements of Section 206 of the Energy Reorganization Act of 1974 and Title 10 of the Code of Federal Regulations Part 21 by stating in the purchase order that 10CFR Part 21 applies to the procurement. These requirements are invoked in the purchase order when GE considers the part to be "safety related" (ie, a basic component as defined in 10CFR Part 21). **Historically** GE's purchase orders with your company have applied **10CFR Part 21**.

When the purchase order invokes 10CFR Part 21, the supplier is responsible for compliance to applicable provisions of this regulation. The audits performed by GE or its agent include an assessment of the supplier's 10CFR Part 21 Program. Key elements of this assessment include the supplier's detailed provisions for 1) Posting, 2) Training and 3) Notification, as discussed below:

Posting Copies of 10CFR21 and Section 206 of Energy Reorganization Act of 1974 shall be posted in conspicuous places available to all employees.

Training Employees shall be trained in the applicable provisions of 10CFR Part 21 and be fully aware of their responsibilities by this regulation. Objective evidence of this training (ie, training logs) shall be documented.

Notification A well-documented procedure must be implemented for discovery of deviations or failure to comply and evaluation of potential defects in accordance with the requirements of 10CFR Part 21.21. GE Understands that many suppliers may **not be aware of the end use** of the materials, components or services they provide to GE and **consequently will not be able to evaluate potentially reportable (ie, to the NRC) defects** or noncompliance's; in these cases, uner the provisions of 10CFR Part 21.21.b, the supplier must inform GE of the deviation or failure to comply within 5 working days of discovery so that GE may perform the appropriate evaluation as required by 10CFR Part 21.

Requested Information:

In order to assess how our supplier base has implemented the requirements of 10CFR Part 21, we are requesting that you provide us with the following

information: 1. Do you have copies of 10CFR Part 21 and Section 206 of Energy Reorganization Act of 1974 posted as required? Please indicate the specific locations where posted. 2. Are your employees trained in the applicable requirements of 10CFR Part 21 and do they fully understand their responsibilities for notification of deviations or noncompliances? Do you maintain training logs with individual employee signatures and dates? Please provide a copy of the training log. 3. Do you have a formal notification procedure that is in compliance with 10CFR Part 21.21? If so, please attach a copy of this procedure(s) for GE's review.

Your assistance with this survey is sincerely appreciated! If you have any questions or comments, please don't hesitate to contact us. Very truly yours, /S____ Herbert A. Beatty, Quality Engineer /S_____Richard J. Mack, Manager, Purchased Material Quality Control.

CX 10 Excerpts of Transcript of Lambda Research Procedure Review of Pole Figure Procedure used for GEN texture analysis, April 1999.

p. 27. Prevey: I'd thought we'd wing it. See if it came out right?

Glavicik: No. **I thought that the procedure was...was accurate** in terms of the way things were supposed to be done. I was trying to follow...

Prevey: Well it was at one time. But you've never been trained in how to do this. **Why would you override how they are doing it?**

....

p. 28. Glavicik: Yeah. I believe, what I did, was I **asked them was to do it as the procedure** until we got this ironed out.
Prevey: Well, that was a serious mistake.
...
p. 30 Prevey: Do not assume that this is correct, because **nobody followed the procedure to maintain the damn procedures.**
Glavicik: OK.
Prevey: And do not assume what someone told you that isn't in here is correct either. Neither one is a safe assumption in this place now, OK?

CX 63 p. 2 DOL Investigator Henry Yost Lambda Research Inteview Page #2 of 4
04/27/00, Approximately 1:15 pm to 1:45 pm
Henry Youst (WHY), OSHA and Paul Prevey (PSP), witnessed by Kathleen Bauer (KBB) In the Matter of Mark J. Kelly (MJK)

PSP pulled out copies of report #5-8728 dated 06/10/99, MJK's fax to McKinney of 06/21/99, and report #5-8796 dated 07/02/99. PSP gave the following information; the client was notified in both he cover letter and the conclusions section of the problem with the data of one of the three samples (PSP shows relevant sections of 06/10/99 report #5-8728 to WHY). WHY asked how it was determined there was a problem. PSP responded by demonstrating how pole figure measurements are affected by the angles of measurement and how the peak was not even caught on the original measurement due to sample position. The data produced

measured only noise. PSP showed a copy of the original pole figure to WHY. PSP explained that he had written the software to be able to find the pole figure, but that the angle of measurement was not left to the software, it had been directed to hit a certain angle. **MJK** probably used the JCPDS cards to find the normal range for that specific material. The data that was produced was obviously wrong in appearance. The pole figure produced was **not even physically possible**. Mike Glavicik (MGG) found the error when he received the data. The original report was issued. **MJK** ran the pole figure again with the improperly mounted specimen and replicated the same data on 07/10/99 (PSP showed the pole figure of that measurement from MJK's 06/21/99 fax to McKinney to WHY). MJK then faxed Chuck McKinney at GE that the original data was correct as he was able to replicate it....

PSP states that we require a QA Incident Report in addition to alerting the client. The purpose is to document the error to auditors as well as to inform all parties involved of the problem and it's solution, to fix it forever. PSP brought out a copy of MJK's original draft of the QA Incident Report and showed how it compared to the final draft. WHY noted **that there were changes on PSP's copy of the draft which were not on the copy he received from MJK**. (Halted discussion of how this could have happened). PSP noted why he made each specific change to MJK's original draft of the QA

Incident Report. PSP states **that after waiting 6 months for MJK** to get a final draft of the QA Incident Report, PSP requested Marie Marawi, our QA Administrator, to prepare a finished document. WHY requested a copy of the marked up version of the QA Incident Report which was similar to, but did not include all of the revisions which PSP's copy had. PSP states that the QA Incident Report is essential to the QA system so that everybody knows what is going on and agrees to the solution. WHY recommends that we add more specific dates to the QA Incident Reports in the future.

ARB Exhibit C. Affidavit of Prevey

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DISTRICT
Case No. C-1-00-661
Judge Beckwith
AFFIDAVIT OF PAUL S. PREVEY
Mark J. Kelly, Plaintiff v.
Lambda Research, Inc. Defendant.
Having been duly sworn, I hereby state as follows: 1. I am the President and Director of Research at Lambda Research, Inc. ("Lambda")
2) Quality Assurance Incident Reports ("QAR") are internal reports that are generated when errors occur with testing at Lambda.
3) QAR's are not generated for anything other than Lambda's own internal quality

control purposes. 4) Lambda is not required to send QAR's to anyone, including its clients or any government agency. S/_____ Paul S. Prevey Sworn to before me and subscribed in my presence this the 24th day of July, 2001. S/____Robert A. Dimling Notary Public Robert A Dimling Attorney at Law.

ARB Exhibit D Excerpt of Deposition of Paul Prevey taken for the DOL action (Prevey's responses noted with "A" for answer).

Q. Do auditors routinely ask to see QA Incident Reports
A. They asks for the response that we make in the event that there's a problem observed, an error made in the QA System. Now we have this QA system as something that we created as that response.
Q. **They ask to see the response**, and , in fact, in your system, **the QA incident report is that response?**
A. Right, which we evolved to fill that need. Right.

T. 746: ALJ Hearing Transcript of Mr. Dimling Statement to the ALJ on Sept. 18, 2001, p. 746.

PROCEEDINGS (9:00 am)

MR. DIMLING: Your Honor, if I may?

JUDGE KANE: Yes, sure.
MR. DIMLING: During the testimony on Friday, the Court expressed a concern that at some point the witness was testifying and I was nodding my head, that in some way it could have been **indicating or signaling something to the witness** and I just wanted the Court to know that I did not, and I represent to you that I was not coaching that witness. I was not signaling the witness. I apologize for any confusion that I may have created in the Court's mind. So I just wanted the Court to note that.
JUDGE KANE: Okay, thank you. When I saw that, I thought it was probably inadvertent and it was, but it was something that I noticed, so I thought I should bring it up,
MR. DIMLING: I apologize, I was turning, kind of **watching Mr. Kelly ask questions** and turning back to the witness, so I'm not sure what precisely **the Court noticed**, but I wasn't giving him any kind of coaching or signaling the witness. I wouldn't do it, and never have.
JUDGE KANE: Okay.
MR. DIMILING: And I apologize for any confusion that I created as far as the Court's impression of what was occurring during the hearing. Thank you.

T. 861. ALJ Hearing Transcript of Mr. Prevey Testimony on Sept. 18, 2001, p. 861.
(Q=Dimling question. A= Prevey answer.)

Q. There's been a fair amount of testimony about quality assurance incident reports. Just for the record, what is a quality assurance incident report?
A. The QA incident reports are something we initiated years ago as mechanism, a form to fill out to document any time there was an escape or some problem that seemed to warrant it. In that, the nature of the problem is identified, the cause of the problem is identified, and then what recommendation, what solution we decide to adopt is documented and this is placed permanently in our QA records. **I think there's been a misrepresentation throughout these proceedings that this is somehow the notification to the client.** I mean, that is not true.

OBES Telephone Hearing Testimony, June 2000: Mark Kelly v. Lambda Research. Q: Questions from hearing officer. A: Answers from Mark Kelly.
Q. Were there any other government agencies that you talked to before tour resignation?
A. Talked to —
Q. I'm sorry?
A. I called...Well I was referred to the NRC and the DOL and I never really **(inaudible)** with anybody else.
Q. Hearing Officer: Okay. I don't think I have any other questions for you, Mr. Kelly.